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

REPLY OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

ORAL ARGUMENT REQUESTED

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

TABLE OF AUTHORITIES

CASES

RULES

ARGUMENT

Plaintiff's response is largely divorced from reality. Plaintiff employs strawman after strawman, warping Defendants' points beyond recognition, and repeatedly twists facts and case law. In the end, Plaintiff cannot salvage the district court's failure to vet an unreliable, subjective, and irrelevant expert, nor has Plaintiff pointed to sufficient evidence that Defendants intentionally discriminated based on sex stereotypes.[1]

I. Plaintiff's tenure expert should have been excluded.

A. Defendants did not waive objections to this unreliable witness.

To hear Plaintiff tell it, Defendants waived or stipulated away nearly every argument. This is not true, and Plaintiff's tenure "expert" Dr. Parker is a key example. Defendants moved to strike Parker in a pretrial motion in limine. D.A.Vol.1 at 73–124.[2] Plaintiff claims Defendants waived this argument because they "failed to renew objections at trial." Plaintiff's Reply/Response Brief ("Pl's Resp.") 34-35. But a follow-up objection during trial was not required. Plaintiff cites language from *McEwen v. City of Norman*, 926 F.2d 1539 (10th Cir. 1991), that this Court disavowed just two years later. *See United States v. Mejia-Alarcon*, 995 F.2d 982, 988 n.3 (10th Cir. 1993) ("[T]he

---

[1] Defendants and Plaintiff both omitted materials from their respective appendices. *See* Defs' Unopposed Mot. to File Supp'l App'x, 2/21/19. With the Court's permission, *see* Order, 2/22/19, and with Plaintiff's agreement and assistance, Defendants have filed a supplemental appendix with this reply. Thus, Plaintiff's arguments about a deficient appendix are moot.

[2] Citations herein use the same format as Defendants' Principal/Response Brief ("Defs' Br."). *See* Defs' Br. 1 n.1. The supplemental appendix will be cited as D.A.Vols.5–11 at XXXX.

broad dicta in *McEwen* is inconsistent with prior and subsequent Tenth Circuit cases holding that a motion in limine may preserve an objection for appeal."). As Plaintiff reluctantly acknowledges, *Mejia-Alarcon* says a pretrial objection is sufficient if the issue: "(1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation." *Id.* at 986.

Plaintiff does not contest the first two prongs. Plaintiff's only argument is that Defendants effectively admitted the court's ruling was equivocal by pointing out that the court failed to rule on Parker's reliability or methodology. Pl's Resp. 35. But the court expressly stated that methodology concerns *were for cross-examination in front of the jury*—not for further consideration by the court. *See* D.A.Vol.1 at 128. That is as unequivocal as a ruling can get, telling Defendants that the court was never going to prevent the jury from hearing Parker. The court's ruling on reliability and methodology was "not made conditionally or with the suggestion that the matter would be reconsidered." *Mejia-Alarcon*, 995 F.2d at 987 (citation omitted). It would have been futile for Defendants to object again at trial. *See id.* at 986 ("When counsel diligently advances the contentions supporting a motion in limine and fully apprises the trial judge of the issue … application of the rule requiring parties to reraise objections at trial … makes little sense." (cleaned up)).

Plaintiff cites no case where the Tenth Circuit found waiver in similar circumstances. Even if *McEwen*'s facts were controlling, that district court "expressly

reserved ruling on the plaintiff's motion in limine until trial" and then at trial openly "invited the plaintiff to make a record on the [prior] ruling." *Mejia-Alarcon*, 995 F.2d at 988 (discussing *McEwen*, 926 F.2d 1539). (The plaintiff declined.) Nothing remotely like this happened here. *See also Mejia-Alarcon*, 995 F.2d at 987 (collecting cases).

B. Plaintiff cannot rescue the court from its failure to be a gatekeeper.

The district court failed to issue findings on Parker's methodology and reliability, and Plaintiff's attempt at rehabilitation is unpersuasive. To begin, citing *Storagecraft Tech v. Kirby*, 744 F.3d 1183 (10th Cir. 2014), Plaintiff claims that "courts need only focus their attention on the *Daubert* factors implicated by the unique circumstances of the case and in light of the specific challenges raised." Pl's Resp. 36. But Defendants explicitly challenged Parker on reliability and methodology. D.A.Vol.1 at 81-88. Regardless, no manner of "focus" eliminates a court's duty to analyze reliability under *Daubert*—*Storagecraft* itself says so: "Before admitting expert testimony at trial, a district court must assure that it is both reliable and relevant." 744 F.3d at 1190.

Indeed, *Storagecraft* counsels strongly for Defendants. Foremost, *Storagecraft* reiterates Defendants' point that "[w]hen a party objects to proposed expert testimony, the court 'must adequately demonstrate by specific findings on the record' that it has taken these gate-keeping responsibilities seriously.'" *Id.* (emphasis added) (citation omitted). *Storagecraft* then lays out several lessons on point: First, "it is not sufficient for a district court simply to say on the record that it has decided to admit the expert

testimony after due consideration." *Id.* But that is essentially what happened here regarding reliability. "[A]fter the consideration of the arguments raised by the parties," the court wrote that it would allow Parker's testimony; "[to] the extent Defendants raise challenges to the procedure used by Dr. Parker or challenge his methodology," the court then stated, "those arguments are matters to be addressed through proper cross-examination." D.A.Vol.1 at 127-28. This two-step is not permitted, per *Storagecraft*.

The second lesson of *Storagecraft* is that a "court must reply in some meaningful way to the *Daubert* concerns the objector has raised. So, for example, if the reliability of an expert's methodology is at issue, it's not good enough for the district court to stress the expert's qualifications." 744 F.3d at 1190. This is also directly on point. Defendants challenged the reliability of Parker's methods, and the district court responded by saying he was "certainly … qualified" while punting methodology to the jury. D.A.Vol.1 at 127-28; *see also* Pl's Resp. 45 (claiming court "focus[ed] its reliability inquiry" on Parker's qualifications). These two *Storagecraft* lessons also refute Plaintiff's contention that the court below fulfilled its duty by simply regurgitating a summary of the parties' respective arguments. Unless a court makes specific findings and responds meaningfully to

objections, a mere argument recitation just isn't enough—especially here where the court never said it agreed with Plaintiff's arguments on reliability and methodology.[3]

Plaintiff, in turn, claims that telling a party to take methodological concerns to the jury is a common practice that does not signify abdication. Pl's Resp. 37. This might be true if the court below actually made a reliability determination before doing so. But it did not. That is what distinguishes *Valley View Angus Ranch v. Duke Energy Field Servs.*, 410 F.App'x 89 (10th Cir. 2010) (unpublished), where the trial court found, among other things, that the objecting party had failed to "present a sufficient basis for rendering [the evidence] inadmissible as unreliable" and *then* mentioned jury consideration. *Id.* at 93. That court's findings were not extensive, but it still made an actual reliability finding on the record. No such finding was made here.

C. The district court's gatekeeping failure harmed Defendants.

Storagecraft holds another lesson: "insufficient gate-keeping findings may not warrant reversal if the appellee can persuade us the error was harmless." 744 F.3d at 1190-91. The burden is on the *appellee*, not the appellant, and Plaintiff (as cross-appellee) has not shown harmlessness. To the contrary, Plaintiff openly admitted that Parker was

[3] The court's failure to make such a statement on reliability and methodology is made even more glaring by the fact that it did explicitly embrace a DOJ argument distinguishing one of Defendants' cases on relevance grounds. *See* D.A.Vol.1 at 128.

"very important." Tr.Vol.5 at 834.[4] This alone shows harm. *See, e.g., Reed v. Gen. Motors*, 773 F.2d 660, 664 (5th Cir. 1985) ("Considering how important the matter was considered to be, we cannot overlook it now as harmless ….").

In arguing for harmlessness, Plaintiff misrepresents case law and Defendants' brief. First, Plaintiff asserts that Defendants have "not argued let alone shown that admission of Parker's testimony sowed prejudice." Pl's Resp. 48. This is false. Defendants *explicitly* argued, with support, that Parker's testimony "cannot possibly be viewed as cumulative or harmless." Defs' Br. 29; *see also id.* at 26. Second, Plaintiff alleges that "[t]he correct rule is stated in *Kinser v. Gehl Co.*, [184 F.3d 1259 (10th Cir. 1999),] which observes that erroneous admission of expert testimony is typically deemed harmless error and thus no new trial is warranted." Pl's Resp. 48. But *Kinser* never says admission of expert testimony is typically deemed harmless; Plaintiff appears to have invented this idea. Third, Plaintiff cites *Sanjuan v. IBP,* 160 F.3d 1291 (10th Cir. 1998), claiming this Court explained there "that it is rare for improper admission of expert testimony to sow prejudice." Pl's Resp. 48. This is also a fabrication, as *Sanjuan* says nothing about prejudice being rare or unusual.

---

[4] Plaintiff's original appendix omitted Pages 828-857 of the trial transcript, which encompassed closing arguments. Defendants have included these 30 pages in the supplemental appendix. D.A.Vol.11 at 2771-2801. Defendants' principal and reply briefs cite to these 30 pages frequently. *See, e.g.,* Defs' Br. 21 (citing Tr.Vol.5 at 841).

Nevertheless, citing *Goebel v. Denver & Rio Grande W.R.R.*, 215 F.3d 1083 (10th Cir. 2000), Plaintiff contends that "the jury could have returned a verdict in Tudor's favor based on other evidence at trial." Pl's Resp. 48. For example, Plaintiff writes, "Tudor, Cotter-Lynch, Weiner, Mischo, and Spencer variously testified to tenure rules and standards at Southeastern, the particular rules in the English Department, and tenure processes." *Id.* This explanation of the evidence is so ambiguous and generalized as to be useless in determining harmlessness. It also ignores that Parker performed a unique comparator analysis and testified more favorably about Plaintiff's tenure merit than any other witness, including Plaintiff's own eyewitnesses.[5] *See Goebel*, 215 F.3d at 1089 (rejecting harmless error argument because expert's testimony uniquely "establish[ed] the medical causal link"); *Adamscheck v. Am. Family Mut. Ins.*, 818 F.3d 576, 590 (10th Cir. 2016) (finding prejudice where other evidence at trial "was not a substitute for or cumulative of Dr. Broker's expert opinion"). Parker's testimony was not cumulative.

[5] To recap: three of Plaintiff's witnesses reviewed Plaintiff's portfolio in 2009-10: Mischo testified it was merely "sufficient," Tr.Vol.3 at 390, Spencer testified it was "weak" and "not … strong," Tr.Vol.3 at 444, and Prus testified parts of it "lacked professional competence." Tr.Vol.3 at 465–66; *see also* Defs' Br. at 8–24. Parker, however, testified it was "strong" and "stronger than I'm accustomed to seeing." Tr.Vol.2 at 254–55; *see also* D.A.Vol.3 at 721–22.

D. Plaintiff fails to show Parker's testimony was reliable or relevant.

1. Case law

Plaintiff does not cite a single case where a court permitted a tenure "expert," whereas Defendants have pointed to numerous cases excluding such experts and questioning their legitimacy. Defs' Br. 32-33. So this is hardly a situation where it is "readily apparent" that Parker's testimony should have been admitted. *See Storagecraft*, 744 F.3d at 1190-91. Quite the opposite: the decision below was an outlier, made even more remarkable because the court did not explain itself on reliability and methodology.

Plaintiff counters Defendants' case law by citing *Namenwirth v. Bd. of Regents of Univ. of Wisc. Sys.*, 769 F.2d 1235 (7th Cir. 1985), claiming it affirmed how "essential" comparative evidence is in a tenure denial case. Pl's Resp. 46. But *Namenwirth* did not involve expert admissibility; and regardless, Plaintiff misrepresents the case. *Namenwirth*, in reality, found no discrimination and emphasized that courts should approach internal tenure disputes with great caution because "there is no algorithm for producing those judgments." 769 F.2d at 1243. Indeed, *Namenwirth* unambiguously stated that, "in a case of this sort, where it is a matter of comparing qualification against qualification, *the plaintiff is bound to lose*." *Id.* (emphasis added).

Plaintiff also claims the district court distinguished *Goswami v. DePaul Univ.*, 8 F.Supp.3d 1019, 1035 (N.D. Ill. 2014), by "recognizing that in situations like this one—where it is alleged that university procedures were not followed—expert testimony

regarding the tenure process is appropriate." Pl's Resp. 44. *Goswami* indeed speculated that expert testimony "may" be relevant if it concerns deviations from university procedures. *Goswami*, 8 F.Supp.3d at 1035-36. But Parker did not focus on alleged procedural irregularities; rather, his entire project was comparing Plaintiff to other candidates, *see* D.A.Vol.3 at 718, an "expertise" *Goswami* firmly rejected. *See* 8 F.Supp.3d at 1036 ("[W]here the expert testimony sought to be introduced deals with … qualifications for tenure, the testimony is … irrelevant.").

Lacking precedent for Parker's testimony, Plaintiff erroneously says Defendants' "own witnesses testified that the best means of flushing out discrimination … in the tenure review process is to have outside academics … evaluate applications." Pl's Resp. 41. Plaintiff cites a single witness (former President Snowden)—not "witnesses"—and Snowden didn't discuss discrimination. Rather, he testified it might be a good tenure quality check to have outsiders look at scholarship, but added that one should *not* "ask them whether the person should be … tenured." Tr.Vol.5 at 780. Snowden also testified that outside evaluations are not the expectation "at a smaller school like Southeastern." Tr.Vol.5 at 780. Snowden's testimony cuts strongly against Parker.

2. Foundation

Plaintiff's defense of Parker on foundation is again riddled with strawmen and misdirection. Plaintiff protests that "Southeastern never asked Parker about his experience evaluating tenure candidates in Oklahoma universities, so there is no

foundation" for criticizing him on this ground. Pl's Resp. 40-41. But the foundation is Parker's own expert report, which was given to the jury and includes no references to pre-existing knowledge of Southeastern or Oklahoma higher education. *See* D.A.Vol.3 at 718-47. Parker's CV does no better. *See* D.A.Vol.5 at 1273-91. Defendants flagged this lack of foundation for the court, *see* D.A.Vol.1 at 81, 88, which ignored it.

Plaintiff admits that Parker had to evaluate a "reconstructed version" of Tudor's 2009-10 tenure portfolio. Pl's Resp. 42. Unrebutted evidence indicates this reconstruction was different from the original. *See* Defs' Br. 47.[6] So, again, Parker did not analyze the same version that Defendants evaluated—a fact he repeatedly admitted. *See* D.A.Vol.3 at 718; Tr.Vol.2 at 229, 250, 278. How, then, could his testimony possibly show Defendants are lying about the original portfolio, as Plaintiff claims? Pl's Resp. 39. It cannot. But even assuming the reconstructed portfolio was identical to the original, Parker's conclusions were more favorable to Plaintiff than Plaintiff's own eyewitnesses, *see supra* note 5, demonstrating that Parker's methods are unreliable. Plaintiff has never attempted to explain this major discrepancy.

[6] Plaintiff claims Mischo testified that the portfolio was not missing essential documents. Pl's Resp. 73. But Mischo's testimony clearly refers to the original portfolio being complete in 2010; he says nothing about the present reconstruction. Tr.Vol.3 at 392.

3. Methodology

Plaintiff fails to justify Parker's subjectivity. Plaintiff argues that "considerable evidence" showed "that tenure decisions at Southeastern were not supposed to be subjective." Pl's Resp. 44. But of *course* universities don't consider their tenure processes to be a coin-flip or lottery. That in no way invalidates the fact that judging scholarship, service, and innumerable other factors is a highly complex endeavor, full of subjective judgment calls, as attested to by numerous courts and even one of Plaintiff's own witnesses. *See* Defs' Br. 5, 32-33 (collecting cases); *id.* 23-24 (Mischo: process is "inherently subjective"). Indeed, Plaintiff confesses elsewhere that Parker was testifying about "partially subjective" decisions. Pl's Resp. 44.

Tellingly, Plaintiff never addresses the litany of purely subjective statements pervading Parker's report and testimony. *See* Defs' Br. 33-34. Instead, Plaintiff insists that Parker followed "expert" standards for, among other things, judging scholarship and its "prestige." Pl's Resp. 45. Plaintiff then contradictorily asserts that Parker's expertise is actually "rooted in his experience rather than scientific proof or clear professional standard." *Id.* Thus, Plaintiff contends, the court "was correct to focus its reliability inquiry on assessing whether Parker's experience leads to the conclusions that he reached and how that experience is reliably applied to the facts." *Id.* As noted above, the district court didn't perform a reliability inquiry, much less focus it anywhere. Regardless, it is difficult to square Plaintiff's admission with Parker's actual report,

which is presented in a pseudo-scientific fashion. Moreover, if Parker relies on experience alone, it is even more reason to exclude him—given that he had no experience in Oklahoma higher education.

Next, Plaintiff responds to Defendants' critique that Parker's sample size was too small merely by saying that this was all that was available. That effectively concedes Defendants' point: tenure decisions, due to scarcity of comparators and subjectivity, do not lend themselves to scientific "expertise." *Cf. Ram v. New Mexico Dep't of Env.*, 2006 WL 4079623, at *18 (D.N.M. 2006) ("[T]he magnitude of the relevant data in this case was [not] so large that a jury could not fairly analyze it without expert assistance.").

Most disturbingly, Plaintiff admits Parker's testimony is being used for extreme purposes. Specifically, Plaintiff says Parker's report shows that McMillan "lied" about the quality of Plaintiff's portfolio, and that this lie "casts doubt on the veracity of McMillan's other statements, his overall rationale for recommending against tenure, and whether he and other administrators actually believed Tudor was not qualified." Pl's Resp. 39. This is absurd. For starters, the claim contradicts Plaintiff's "harmless" error arguments. But even setting that aside, an out-of-state academic (contradicted by Plaintiff's own eyewitnesses) cannot possibly be used as an "expert" to prove that Defendants intentionally lied and committed perjury about their tenure opinions. *See Johnson v. Weld Cty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010) ("[A] plaintiff must produce evidence that the employer did *more* than get it wrong." (emphasis added)).

This type of overreach is why numerous courts have rejected tenure experts—*i.e.*, to prevent parties from smearing people who disagree about a candidate's qualifications as liars without having to produce any real evidence of mendacity. *See, e.g.*, *Goswami*, 8 F.Supp.3d at 1030 (experts will not "help the jury in determining whether one or more members of the tenure committee lied"). Otherwise, virtually every tenure denial could be labeled as the decision of "liars" solely based on one person's subjective disagreement. It is hard to imagine a more stifling approach to academic freedom. The court below had the same erroneous view, writing that Parker "will be helpful to the jury in evaluating the **veracity** of Defendants' stated reasons for denying Dr. Tudor tenure." D.A.Vol.1 at 127 (emphasis added). The judgment below should be reversed.

II. Plaintiff cannot avoid *Etsitty* and the legal errors committed below.

A. Plaintiff cannot create an issue of fact by playing word games.

Plaintiff claims Defendants cannot challenge the motion to dismiss and summary judgment orders directly because there are "mixed issues of law and fact rather than pure issues of law." Pl's Resp. 50.[7] This is at least partially incorrect. Defendants have contested, as a matter of law, Plaintiff's ability as a biological male to bring a claim as a

[7] Broadly speaking, Plaintiff also claims Defendants waived challenges to various pretrial rulings because they didn't specifically designate those rulings in their notice of appeal. Pl's Resp. 50. To the contrary, "a notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment." *McBride v. CITGO Petroleum*, 281 F.3d 1099, 1104 (10th Cir. 2002).

biological female under Title VII. Plaintiff, in turn, claims that Plaintiff's status as a biological male is disputed.[8] Plaintiff, to be sure, has repeatedly argued that "biological sex" includes gender identity. At the same time, Plaintiff has admitted that Plaintiff's "birth sex" was male. D.A.Vol.5 at 1340 (citing *id.* at 1373-74); D.A.Vol.1 at 171. It is on this undisputed fact that Defendants argue Plaintiff's suit is legally deficient. Plaintiff has made no attempt to demonstrate that, in 2007, *Etsitty*'s use of phrases like "sex" and "biological sex" meant anything other than what Plaintiff now calls "birth sex." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). Plaintiff cannot create an issue of fact by taking a phrase used by this Court and inserting a different concept. The district court seemingly assumed, as a matter of law, that such a claim was valid; *i.e.,* that one whose "birth" sex was male could nevertheless bring a Title VII claim as a female. *See* D.A.Vol.1 at 19-20; P.A.Vol.2 at 34-35. That legal ruling goes beyond what this Court has held before.

---

[8] Plaintiff also repeats the baseless claim that Defendants waived the right to contest the definition of "sex" as it is used in Title VII. Defendants already refuted this. *See* Defs' Br. 39 n.4. Plaintiff ignores the fact that the district court disagreed with Plaintiff about this supposed stipulation at the jury instruction conference. *See* Tr.Vol.5 at 723. Also ignored is Plaintiff's own comment to the court, from just before Defendants' supposed waiver: "I believe [Brown] is potentially not relevant now that you've issued your decision on summary judgment. His relevance was really only going towards issues as to the definition of sex, which I believe is no longer something that should be presented to the jury at trial." P.A.Vol.6 at 37. *Lyles v. Am. Hoist & Derrick*, 614 F.2d 691, 694 (10th Cir. 1980), does not counsel otherwise, as it was dealing with a stipulation that led to a ruling. Here, to the contrary, the court's ruling led both Plaintiff and Defendants to adjust their trial strategies.

B. Plaintiff's response to *Etsitty* is inconsistent.

Plaintiff alternates between relying on *Etsitty*, ignoring its key holdings, and asking this Court to overrule it. Plaintiff also incorrectly accuses Defendants of several *Etsitty* errors. For example, Plaintiff says Defendants believe *Etsitty* bars sex discrimination claims by transgender people. *Etsitty* indicates otherwise, and Defendants have never disagreed. Rather, they argue Plaintiff never actually made a sex stereotyping case. More important, Plaintiff argues that *Etsitty* does not bar sex stereotyping claims based on transgender bathroom restrictions. Pl's Br. at 66-67. But that is literally what *Etsitty* holds: "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. Plaintiff ignores this, choosing instead to cite a district court decision that *agreed* that bathroom claims can't be relied on and found pretext elsewhere. *See Michaels v. Akal Sec.*, 2010 WL 2573988, at *4 (D. Colo. June 24, 2010) ("*Etsitty* precludes such a claim based solely upon restrictions on Plaintiff's usage of certain bathrooms.").

C. Plaintiff's attempts to circumvent *Etsitty* lack merit.

Defendants agree with Plaintiff: the question of whether Title VII protects transgender persons "per se" is "not properly before this Court." Pl's Resp. 78. *Etsitty* already ruled on this issue; but even if the Court finds *Etsitty* subject to reevaluation, a proper record was not developed below. Plaintiff's later suggestion that it "is

permissible for this Court to affirm the judgment on that basis" is inconsistent with Plaintiff's own admission.

Confusingly, Plaintiff elsewhere contends that Title VII, as interpreted by Defendants, subjects "transgender claimants to disparate treatment" and "should be rejected" under the "canon of constitutional avoidance." Pl's Resp. 82. This would require the Court to embrace the per se theory that *Etsitty* rejected. Regardless, Plaintiff's argument is untethered from case law or evidence. For example, Plaintiff claims that a lack of per se protection means Title VII uniquely singles transgendered persons out. This ignores other categories (such as sexual orientation) that are not included, either. *See Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005). In the end, *Etsitty* indicated that transgendered persons can make sex stereotyping claims, the same as everyone else. Here, Plaintiff never even tried.

III. Plaintiff did not produce sufficient evidence of sex stereotyping or retaliation.

A. Plaintiff failed to rebut many documented facts.

Defendants spent nearly two dozen pages of their opening brief documenting the pre-trial, trial, and post-trial record, with copious citations. *See* Defs' Br. 5-25. Plaintiff dismisses this "lengthy recitation" with a hand wave, claiming it is just a "version" of the facts rejected by the jury. Pl's Resp. 2. But Defendants repeatedly cited Plaintiff's own words, evidence, and witnesses, *see, e.g.*, Defs' Br. 9 (Plaintiff's witness Spencer: Plaintiff's application "was weak"), as well as numerous unrebutted facts.

Plaintiff cannot evade this material. *See, e.g.*, *Zamora v. Elite Logistics,* 478 F.3d 1160, 1168 (10th Cir. 2007) (*en banc*) (McConnell, J., concurring, joined by Kelly, O'Brien, Tymkovich, & Gorsuch, JJ.) ("[W]e may [not] disregard undisputed evidence that favors the moving party."). Moreover, Defendants are the *non*-moving party for half the issues on appeal (*e.g.,* reinstatement), and the jury found for Defendants on the hostile work environment claim.[9] In other words, a substantial portion of the evidence should be construed in favor of Defendants.

B. Defendants preserved their arguments under FRAP 50.

The facts being what they are, Plaintiff next attempts to raise procedural barriers. Plaintiff claims Defendants failed to preserve their sufficiency arguments under FRAP 50(a) and (b). Pl's Resp. 51. While Defendants' Rule 50(a) motion could have been more thorough, contra Plaintiff there is no facial insufficiency under Rule 50(a); rather, context is critical. *See, e.g.*, *Wolfgang v. Mid-Am. Motorsports*, 111 F.3d 1515, 1521-22 (10th Cir. 1997) ("In the context of this trial … Defendants preserved this issue."). Here, context explains the brevity. Namely, the district court insisted that oral preservations be made "very quickly." Tr.Vol.5 at 724-25. As a result, Plaintiff's own preservation effort was virtually identical to Defendants' attempt. Tr.Vol.5 at 724-25. Perhaps

[9] Indeed, much evidence that Plaintiff claims demonstrates sex stereotyping is actually hostile work environment evidence, as it focuses on Defendants' reaction to Plaintiff's 2007 gender transition and is years removed from the tenure denial itself. *See, e.g.*, Tr.Vol.1 at 41–44.

acknowledging this context, the court did not find Rule 50(a) insufficiency, despite Plaintiff urging it to do so. *See* P.A.Vol.5 at 113-14, 154-56; *see also Tharling v. City of Port Lavaca*, 329 F.3d 422, 426 n.4 (5th Cir. 2003) (deeming a succinct oral motion sufficient).

Plaintiff cites *United Int'l Holdings v. Wharf (Holdings)*, 210 F.3d 1207 (10th Cir. 2000), but never acknowledges that *Wharf* says Rule 50(a) attempts are to be "liberally" construed, that "[t]echnical precision is unnecessary," and—most significantly—that "ensuring an opposing party has sufficient notice" is a key factor. *Id.* at 1228-29. Plaintiff never claims to have received insufficient notice of *any* of Defendants' arguments, so there can be no waiver. *See Orion IP v. Hyundai Motor Am.*, 605 F.3d 967, 973 (Fed. Cir. 2010) ("Even a cursory motion for judgment may be sufficient where … it is clear … that neither the court nor the nonmovant's attorneys needed any more enlightenment about the movant's position on those issues." (cleaned up)).

Plaintiff claims Rule 50(b) failure, as well. This situation is undeniably strange, but Plaintiff's arguments are not persuasive. For example, Plaintiff claims that FRCP 6(c)(1)(C) controls, ignoring that this provision applies only in advance of a scheduled hearing. And even if a court can impose a shortened 50(b) deadline under statute or "inherent authority," Plaintiff never explains how it can go so far as to make a post-judgment motion due pre-judgment. Ultimately, this situation is probably controlled by FRCP 83(b), which states that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law … unless the alleged

violator has been furnished in the particular case with actual notice of the requirement." Plaintiff essentially claims Defendants received oral notice and were not entitled to ignore it. But defense counsel never affirmed the order because it was confusing—again, how can a post-judgment motion be due pre-judgment? Subsequently, counsel followed up with chambers, where they were told to follow federal rules. D.A.Vol.2 at 557-58.[10] In this context, there was no actual notice.

C. Plaintiff failed to point to legitimate evidence of sex stereotyping.

Etsitty indicates transgender identity should be irrelevant under Title VII; Plaintiff, instead, made it the focal point of trial and still claims on appeal that it is "an important fact to know." Pl's Resp. 3. Nevertheless, Plaintiff also attempts to identify evidence of sex stereotyping. These efforts are not remotely persuasive. Defendants already refuted Plaintiff's ten "[s]tereotyped comments by key actors" in their opening brief. Defs' Br. 43-46. Seven of the alleged comments, for instance, come from Scoufos, Pl's Resp. 3-4, who was not a "key" decision-maker by Plaintiff's own admission. *See* Defs' Br. 45-46. In addition, most of the comments concern quintessential transgender issues such as bathrooms and pronoun use, Pl's Resp. 3-4,[11] and they come from *years*

---

[10] Neither Plaintiff nor the district court ever disputed this account. *See* P.A.Vol.5 at 154–156.

[11] An amicus claims that using non-preferred pronouns is "prototypical sex stereotyping discrimination," Amicus Brief of Lambda Legal at 10–11, but its cited cases do not address pronoun use. Nor does amicus apply this standard to the district judge in this very case, who referred to Plaintiff as a "he" several times. Defs' Br. 20. Moreover, this argument ignores our current cultural milieu, where pronoun use is at the center of debates on gender identity.

before Plaintiff's tenure process. *Id.*; *see also Weld Cty.*, 594 F.3d at 1212-13 ("To establish pretext from such comments … they [must] be 'somehow ... tied to the employment actions disputed in the case at hand.'"); *Etsitty*, 502 F.3d at 1226 ("isolated and tangential comments … are insufficient").

Plaintiff also invents testimony out of whole cloth: the portions of the record Plaintiff cites often do not say what Plaintiff claims. For example, Plaintiff's claim that "Scoufos asked House what she thought Tudor's genitals looked like" is a fabrication. Pl's Resp. 4. Similarly, Plaintiff's statement that "Administrators attest that this rule was premised on a variety of gender stereotypes," *id.* at 5, is unsubstantiated by Plaintiff's citations, as is Plaintiff's claim that Mischo "attested that there were no faculty complaints about Tudor's restroom use[,]" *id.* at 5-6 n.23. What Mischo actually said was that he heard no concerns "other than at that meeting in the summer of 2007," and he could not remember who was at the meeting. Tr.Vol.3 at 387-88. He also never said "the rule was imposed without any rationale," as Plaintiff claims. Pl's Resp. 5-6 n.23.

Only two of the alleged comments are attributed to McMillan, who is Plaintiff's designated villain. The first references the testimony of a disgruntled ex-employee stating that McMillan privately disagreed with the transgender lifestyle—hardly evidence of discrimination or sex stereotyping, even if true. *Id.* at 4. Were it otherwise,

anyone expressing traditional social mores would be in violation of Title VII—raising serious First Amendment concerns. The second alleges that McMillan didn't feel like Plaintiff should be allowed to use the women's restroom. *Id.* Using this as evidence of a Title VII violation is foreclosed by *Etsitty*. Moreover, nothing indicates that either comment was connected to Plaintiff's tenure process. Rather, the restroom subject matter indicates they were made years earlier, when Plaintiff first transitioned.

Finally, Plaintiff resurrects the attack on McMillan's religion, claiming that he "made employment decisions premised on his peculiar faith-based gender stereotypes." Pl's Resp. at 5 (emphases added). Not only has Plaintiff not proved "decisions," plural, but Plaintiff has provided no evidence that helping a widow find a job is "peculiar" (one hopes not), nor that it involves an invidious sex stereotype. Remarkably, this religious smear is the primary evidence Plaintiff presents under the heading "Key actors' penchant to make decisions based on stereotypes." *Id.* But even Plaintiff's amicus won't promote or defend Plaintiff's religious attacks, attempting instead to downplay them as "unsuccessful," "ham-handed," and a "bad day at the office for Tudor's counsel." *See* Amicus Brief of Lambda Legal at 8-9.

D. Plaintiff has not provided evidence of discriminatory intent.

Plaintiff is correct that, on appeal, the ultimate question is whether there was evidence of "discrimination vel non." *Abuan v. Level 3 Commc'ns,* 353 F.3d 1158, 1169 (10th Cir. 2003). Plaintiff, however, produced no contemporaneous evidence that an

actual decision-maker intentionally discriminated against Plaintiff based on sex stereotypes. Rather, Plaintiff's case revolves entirely around an unreliable expert, transgender identity, and stray comments from non-decisionmakers years prior to Plaintiff's tenure process.

Plaintiff claims the "cat's paw" theory allows McMillan's alleged animus—which was never demonstrated—to be imputed to the actual decision maker, President Minks. Pl's Resp. 71-72. Plaintiff never raised this argument below, *see, e.g.*, D.A.Vol.2 at 292-326, and the jury was not instructed on it, P.A.Vol.2 at 38-68, so it is waived. *See Scott v. Sarasota Doctors Hosp.*, 688 F.App'x 878, 885 (11th Cir. 2017) (unpublished) (plaintiff waived "cat's paw" by not arguing it "or anything resembling [it] before the district court"); *Lewis v. Norfolk S. Ry.*, 590 F.App'x 467, 470 (6th Cir. 2014) (unpublished) (same). Moreover, this theory requires evidence that the decision-maker "uncritically" relied on a biased subordinate who "used" him as a "dupe." *Thomas v. Berry Plastics*, 803 F.3d 510, 514 (10th Cir. 2015). But Plaintiff produced no evidence that Minks was a "dupe" who "uncritically" relied on McMillan. Indeed, Plaintiff never called Minks to testify, nor did Plaintiff elicit much trial testimony focusing on Minks.

Nevertheless, Plaintiff claims Minks tasking McMillan with delivering Minks' reasons to Plaintiff shows Minks "repeatedly rubberstamped McMillan's decisions." Pl's Resp. 72. But the mere fact that a university president asked a subordinate to deliver messages cannot possibly be enough for a "cat's paw." Plaintiff also claims Professor

Knapp stated that "it all went back to McMillan," *id.*, but Knapp only testified that "[i]t *seemed* that the [original] application was stopping with Dr. McMillan" and never even mentioned Minks. Tr.Vol.3 at 504 (emphasis added). The record evidence points to Minks being in control, not the other way around. *See, e.g.*, P.A.Vol.5 at 215-16 ("Dr. Minks' decision … moots your appeal"); P.A.Vol.6 at 31 (Minks: "reasons for *my* denial"); Tr.Vol.4 at 610 ("Minks set the deadline").

Plaintiff also cites alleged "procedural irregularities." First, Plaintiff confusingly claims Scoufos "concocted post hoc rationales for denial which she incorporated into a backdated letter she planted in Tudor's tenure portfolio after-the-fact." Pl's Resp. 75. But the evidence Plaintiff cites for this charge are just two different emails Scoufos sent to two different recipients (McMillan and Plaintiff) on the same date, informing them of her decision to recommend against tenure. Plaintiff apparently believes that because the email to McMillan gives Scoufos's reasons, but the email to Plaintiff does not, that the McMillan memo is somehow "backdated." Plaintiff floated this conspiracy theory on the stand as well, Tr.Vol.1 at 86-87, but Plaintiff's counsel never asked other witnesses about it directly, produced any evidence for it, or even mentioned it in closing.

Plaintiff also claims that Minks delegating responsibility to McMillan was a "suspicious … pretense to refuse to comply with the [faculty appellate committee's] order." Pl's Resp. 75-76. But, again, a president delegating a task is routine and maybe the furthest thing from suspicious imaginable. Finally, Plaintiff finds it irregular that

"[t]he letter McMillan eventually sent [to Plaintiff], though dated April 2010, was postmarked and arrived to Tudor in June 2010." Pl's Resp. 76. Why is this suspicious? Plaintiff doesn't say. Where is the proof of this? Not in the cited materials.

Finally, Plaintiff claims that Defendants never barred any other professor from reapplying for tenure, which supposedly gives rise to an "inference that Southeastern was pursuing a discriminatory agenda." Pl's Resp. 76-77. The only testimony to support this supposed fact was from a single professor who just said she had not "heard" of such a denial. Tr.Vol.2 at 317. That's just not enough, especially when Plaintiff undeniably *refused* Defendants' offer to withdraw and reapply later, and former President Snowden testified that "I've been at seven universities … [and] never seen or heard of people being allowed to reapply after they've been denied tenure." Tr.Vol.5 at 801.

E. Plaintiff's arguments on retaliation are mistaken.

Plaintiff claims Defendants failed to challenge the retaliation verdict under Title VII's opposition clause. Pl's Resp. 57. But Defendants admitted that Plaintiff engaged in protected conduct, generically, which would include participation or opposition, and nonetheless argued that Plaintiff has not shown that "when Plaintiff engaged in protected conduct, Defendants even considered it a possibility that Plaintiff could reapply for tenure." Defs' Br. 52. This tracks the jury instruction, which did not—contrary to Plaintiff—explicitly "instruct[] the jury that Tudor may prove her retaliation

under either the participation or the opposition clause." *Compare* Pl's Resp. 58, *with* P.A.Vol.2 at 57-58.

Plaintiff contends that Defendants denying reapplication a month or two after Plaintiff complained shows retaliation. Pl's Resp. 59-60. But "close temporal proximity" *and* the "underlying circumstances" are important, *Ramirez v. Okla. Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994), and here the Defendants were well down the path to denial before Plaintiff complained, as Plaintiff had rejected Defendants' offer months earlier. P.A.Vol.5 at 229. Plaintiff claims this offer has been "unmasked as false" because McMillan admitted in his denial letter that rules did not bar reapplication. Pl's Resp. 60. This ignores the rest of the letter, which states plainly that there is no rule allowing *for* a reapplication, either, and emphasizes that Plaintiff was extended an offer to withdraw and reapply later, but refused. *See* P.A.Vol.5 at 229.

Plaintiff also claims that "Tudor did complain about the 'offer' being illusory *in writing* to Scoufos the same day it was made." Pl's Resp. 60. But while Plaintiff's letter admits that an "offer" was made, it says nothing about the offer being illegitimate. P.A.Vol.5 at 226.[12] Finally, Plaintiff claims that an "April 2010 email between Weiner, Minks, McMillan, Scoufos and Babb evidences none of the decision-makers thought a

[12] Plaintiff lied about this on the stand. *Compare* Tr.Vol.1 at 69, *with* P.A.Vol.5 at 226. Moreover, Plaintiff now claims Mischo said it was an "illegitimate" offer, but Mischo just testified that it was not a "generous" offer. *See* Tr.Vol.3 at 405.

bar [to reapplication] existed." Pl's Resp. 76. But that email only expresses Weiner's views, and he was not a decisionmaker. And the email emphasizes—like McMillan—that the ability to reapply was *not guaranteed*. P.A.Vol.5 at 234-35.

Finally, Plaintiff asserts that if Tudor's retaliation claim survives, "reviewing Tudor's sex discrimination claims is unnecessary." Pl's Resp. 54. This is incorrect because the remedies are not the same. If Plaintiff proved retaliation, but nothing else, then Plaintiff would have no argument that this Court should order reinstatement to a tenured position, and the lower court's front pay award would likely need to be reduced.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully Submitted,

/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

CERTIFICATE OF COMPLIANCE

This document was prepared using Microsoft Word 2016 and complies with the word limit of Fed. R. App. P. 32(a) because, excluding the parts exempted, it contains 6,412 words, and this document was prepared using a proportionally spaced serif typeface (Garamond 14-point main text and 13-point footnotes). This document was scanned for viruses using Symantec Endpoint Protection version 14.2 and all paper copies submitted to the court are exact copies of the version submitted electronically. Additionally, all required privacy redactions were made in accordance with Fed. R. App. P. 25(a)(5) and 10th Cir. 25.5.

/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

CERTIFICATE OF SERVICE

I certify that on March 4, 2019, I caused the foregoing to be filed with this Court and served on all parties via the CM/ECF filing system. Seven hard copies, which are exact copies 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