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.*	Nos. 18-6102 / 18-6165

OPPOSITION TO MOTION TO VACATE ABATEMENT ORDER

Plaintiff, a transgender professor, brought this case against Defendants under Title VII of the Civil Rights Act of 1964, alleging sex discrimination, retaliation, and a hostile work environment. *See* Defendants' Principal/Response Brief ("Defs' Br.") at 13-15. From the beginning, Plaintiff emphasized transgender identity, despite this Court's ruling in *Etsitty v. Utah Transit Authority,* 502 F.3d 1215 (10th Cir. 2007), that transgender individuals are not a protected class under Title VII. *See* Defs' Br. at 5-7 (*Etsitty* summary); 13-15 (complaint allegations); 18-20 (trial summary). The district court allowed this maneuver, over Defendants' objections, by asserting that Plaintiff was pursuing a "sex stereotyping" case. *See id.* at 15-16; P.A.Vol.1 at 150-51.[1] The jury

[1] This brief uses the same citation format as Defendants' principal brief. *See* Defs' Br. at 1 n.1. Thus, "P.A.Vol.1" is "Plaintiff's Appendix Volume 1."

found for Defendants on the hostile work environment claim and for Plaintiff on the retaliation and two sex discrimination claims. *See* Defs' Br. at 24. The district court thereafter declined to order reinstatement, *see id.* at 25, a decision Plaintiff appealed to this Court. Defendants cross-appealed, explicitly arguing, *inter alia*, that "the district court misapplied *Etsitty* by holding that Title VII covered claims of transgender discrimination focusing on bathroom usage, pronouns, and religion" and that "Plaintiff did not produce sufficient evidence of sex stereotyping." Defs' Br. at 37, 41.

On April 22, 2019, two weeks before oral argument in this Court, the United States Supreme Court granted certiorari on the following question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*." *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107, --- S. Ct. ----, 2019 WL 1756679 (April 22, 2019).[2] This question tracks Defendants' cross-appeal closely. Moreover, the underlying certiorari petition in *Harris Funeral Homes* cites this Court's *Etsitty* decision multiple times as part of the circuit split meriting the Supreme Court's attention—on both the status and sex stereotyping points. *See* Petition for a Writ of Certiorari, *Harris Funeral Homes*, No. 18-107, 2018 WL 3572625 at *15-16, 25 (July 24, 2018). In other words, the

[2] Simultaneously, the Supreme Court granted certiorari and consolidated two cases to determine whether Title VII prohibits discrimination based on sexual orientation. *See Altitude Express v. Zarda*, No. 17-1623, --- S. Ct. ----, 2019 WL 1756678 (April 22, 2019), *and Bostock v. Clayton County, Georgia*, No. 17-618, --- S. Ct. ----, 2019 1756677 (April 22, 2019).

Supreme Court has essentially granted certiorari (1) to uphold, alter, or abrogate the core holding of *Etsitty*, a case that is integral to Defendants' appeal, and (2) to determine the existence, if any, and scope of sex stereotyping claims in the transgender context, claims which formed the basis of Plaintiff's Title VII case. Thus, this Court commonsensically abated the appeal to wait for the Supreme Court's instructions. *Cf. Kittel v. First Union Mortg.*, 303 F.3d 1193, 1194 (10th Cir. 2002) ("As we cannot know whether the Oklahoma court will vacate its default judgment, we believe it to be appropriate to stay further proceedings in this appeal pending the state court's ruling …."). Plaintiff's arguments to the contrary are not persuasive.

A. Plaintiff's shifting positions in this case are difficult to reconcile.

As an initial matter, Plaintiff's current position is in tension with Plaintiff's prior representations and actions. At present, Plaintiff insists it is "probable" that this Court mistakenly believes that *Harris Funeral Homes* "will have some bearing" on the present appeal because it, along with *Bostock* and *Zarda*, "have been popularly labeled as LGBT rights cases." Plaintiff's Motion to Vacate Abatement Order ("Pl's Mot.") at 3-4. Putting aside Plaintiff's lack of confidence in this Court's ability to understand legal nuance, the gist of Plaintiff's present motion seems to be that *Etsitty* is irrelevant and this isn't really an LGBT case at all. *See, e.g.*, Pl's Mot. at 2. At and before trial, however, Plaintiff made transgender identity a focal point of the litigation. *See* Defs' Br. at 13-21; *see, e.g.*, *id.* at 18 (Opening statement: "My client … is transgender. That fact right there is why we're all here today …. Doug McMillan wanted Rachel gone because she's

transgender …. [Defendants are] counting on you to not like transgender people." (citations omitted)). Plaintiff wants to have it both ways—to emphasize gender identity before the jury, but deemphasize it when the Supreme Court seeks to address the issue.

Plaintiff's current downplaying of *Etsitty* does not change the fact that it was the single-most discussed case in this appeal. *See* Defs' Br. at iv; Plaintiff's Reply/Response ("Pl's Br.") at vii. Indeed, both Defendants' cross-appeal brief and Plaintiff's response mention *Etsitty* or its implications in around 15 to 20 pages apiece. And just last month Plaintiff supported, and this Court granted, the motion by Lambda Legal to participate in oral argument. *See* Lambda Legal's Motion for Leave to Participate in Oral Argument ("Lambda Mot.") at 5 (April 4, 2019).[3] Lambda Legal had argued that it should be granted oral argument time because of its experience with cases that "squarely present[] … the question of whether federal sex discrimination protections covered the LGBT plaintiff," Lambda Mot. at 2, and specifically because of its experience with *Etsitty* itself, *see id.* at 4.[4] Moreover, Lambda Legal insisted that even the narrowest view of this case is one that still involves interpreting *Etsitty*. *See id.*

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[3] Lambda Legal says its "mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation." *About Us: Who We Are*, Lambda Legal, https://www.lambdalegal.org/about-us.

[4] Lambda Legal also claimed that "the most prominent mischaracterization of *Etsitty* is to depict the decision as the basis for a circuit split," and it explicitly cited the *Harris Funeral Homes* certiorari petition as an example of a party making this supposed mischaracterization. *Id.* at 4 n.4. Given that certiorari was granted in *Harris Funeral Homes,* it would seem that the U.S. Supreme Court disagrees with Lambda Legal on this point. *See* Rule 10, Rules of the Supreme

If the theories espoused in Plaintiff's present motion are correct—*i.e.*, if *Etsitty* is truly irrelevant in this appeal—then there was no reason to grant Lambda Legal's motion. And yet it was granted, with Plaintiff's approval. Very recently, in other words, Plaintiff wanted to make doubly sure this Court heard Lambda Legal's views on *Etsitty*, Title VII, and transgender persons—going so far as to cede valuable oral argument time if necessary[5]—but now Plaintiff does not believe the Supreme Court's impending views on the same topics are worth waiting on. Again, Plaintiff cannot have it both ways.[6]

In another attempt to downplay the transgender aspect of this appeal, Plaintiff claims that "Dr. Tudor is female," citing "unrefuted evidence" collected in Plaintiff's proposed surreply. Pl's Mot. at 2 & n.2. But that surreply has not yet been approved by this Court, *see* Order, 3/22/19, nor should it be. *See* Defendants' Opp. to Mot. for Leave to File Surreply at 6 ("This Court should treat Plaintiff's motion for what it is: a late and illegitimate attempt to circumvent the Court's rules to get one last swing at Defendants."). Plaintiff can only claim the surreply has gone "unrefuted" because Defendants aren't as anxious as Plaintiff to circumvent this Court's rules by filing a sur-surreply. In any event, Plaintiff's surreply itself ignores the reply's citations to the record

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Court of the United States (listing a circuit split as the first factor for the Supreme Court in deciding whether to grant certiorari).

[5] *See* Lambda Mot. at 5 ("[I]f the court is unwilling to add time to the argument, it can grant leave for me to participate and allow Ezra Young and me to allocate the time between us.").

[6] Notably, Lambda Legal has not asked this Court to stay the abeyance.

showing that Plaintiff's "birth sex" is undisputedly male, and it ignores that there is an open legal question as to whether a person born a biological male, as that term was understood in *Etsitty*, can bring a claim as a female under Title VII. *See* Defs' Reply at 13-14. This matters because the Supreme Court in *Harris Funeral Homes* could provide an answer to that question, and it is a question Defendants have preserved. *See id.*

B. Plaintiff misapprehends the legal standard for abeyances.

Plaintiff asserts that "the Court is mistaken that the issues taken on certiorari are dispositive" in the present appeal. Pl's Mot. at 1. But this Court never said anything about the pending Supreme Court cases necessarily being dispositive, as that is not the standard for ordering an abeyance. Indeed, neither of the two cases cited by Plaintiff claim that this is the standard. *See Landis v. N. Am. Co.*, 299 U.S. 248 (1936); *United States v. Victorio*, 719 Fed. App'x 857 (10th Cir. 2018) (unpublished).

Per the Supreme Court in *Landis*, courts have an inherent power to stay proceedings to avoid wasting time and effort; in doing so, courts must simply exercise their judgment after weighing competing factors.[7] *See id.* at 254-55; *see also In re Kozeny*, 236 F.3d 615, 620 (10th Cir. 2000) (federal courts have "inherent discretion to order a stay"). These factors include the length of the stay, its consequences, the "public

[7] Although *Landis* emphasizes the heavy burden that the party requesting a stay must meet, *id.* at 256; *see also Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 467–68 (10th Cir. 1985) (quoting *Landis*), here the Court granted a stay *sua sponte* and Plaintiff is attempting to get that order reconsidered. If there is a burden here at all, it is on Plaintiff and not Defendants.

welfare," and the "likelihood" that the impending decision will affect the issues in the present case. *See Landis*, 299 U.S. at 256-58; *cf. United Steelworkers of Am. v. Oregon Steel Mills, Inc.,* 322 F.3d 1222, 1227 (10th Cir. 2003) (listing similar factors for a stay pending appeal). Significantly, the *Landis* Court was "unable to assent to the suggestion" that issues in separate cases must be identical before a stay can be issued. 299 U.S. at 254.

Thus, applying *Landis*'s reasoning, a pending Supreme Court decision need not be identical to or dispositive of a lower-court appeal for a stay to be appropriate; rather, it must only have a likely or potential impact on the lower case. In *Victorio*, this Court echoed that factor, denying a prisoner's request for a stay of his habeas petition because an impending Supreme Court decision was "highly unlikely to have any impact" on the prisoner's claims. 719 Fed. App'x at 858 n.1. That is a far cry from the situation here, where *Harris Funeral Homes* could easily affect the present litigation in any number of ways—some of which would actually benefit Plaintiff.[8] To be sure, *Landis* says that a stay should only be granted in "rare" circumstances, but it also emphasizes that stays may be appropriate "in cases of extraordinary public moment." 299 U.S. at 255-56. A Supreme Court certiorari grant on a highly publicized question that has sharply divided appellate courts across the country is very much a rare occurrence and fits the "extraordinary public moment" factor to a "T."

[8] To give just one example, the Court could invalidate *Etsitty* and hold that Title VII covers transgender identity, full stop.

C. Plaintiff's retaliation claim does not obviate the need for a stay.

Plaintiff's primary contention for why *Harris Funeral Homes* does not merit abatement is that "the judgment below can be affirmed on her retaliation claim, an alternative ground that obviates review of her two sex discrimination claims." Pl's Mot. at 6. This argument is wrong on multiple levels.

For starters, Defendants have appealed all three unfavorable verdicts—the retaliation claim and the two sex discrimination claims. *See, e.g.*, Defs' Br. at 51-52; Defs' Reply at 24-26. Plaintiff basically asks the Court either to assume Plaintiff will prevail on the contested retaliation appeal in order to lift the abeyance, which would be inappropriate, or to make a piecemeal analysis of the merits. This latter task would be more complicated than Plaintiff makes it seem. Under Plaintiff's proposal, the Court would have to restart the appeal, hold oral argument, and analyze the lengthy briefs, complex facts, and multifarious case law to determine whether Defendants' retaliation challenge in particular should succeed. This would require, among other things, analyzing Plaintiff's multiple procedural arguments for why the Court shouldn't even reach the retaliation merits. If it decides to affirm on that issue, the Court would then presumably proceed with the rest of Plaintiff's appeal on remedies, possibly with another oral argument. If not, the Court would then re-abate the appeal in order to await the Supreme Court's decision in *Harris Funeral Homes*. This haphazard and halting approach makes little sense. *See Nat'l Chiropractic Mut. Ins. v. Kancilia*, 77 Fed. App'x 445,

454 (10th Cir. 2003) (unpublished) ("Among the various factors relevant to a motion for stay of proceedings … [is] the desirability of avoiding piecemeal litigation.").

Thankfully, this can all be avoided because Plaintiff is not correct about retaliation being a valid alternative ground to affirm the entire verdict. In short, even if Plaintiff prevails on retaliation, the retaliation claim here does not have the same damages and remedies as the sex discrimination claims, so those latter claims would still have to be analyzed. Defendants pointed out two examples at the very end of their reply brief: "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." Defs' Reply at 26.[9] Plaintiff fails to comprehend the first point, claiming that "Southeastern also argues that reinstatement is not a remedy to retaliation." Pl's Mot. at 6 n.13. That is not what Defendants argued. Rather, Defendants' point was that a successful claim that Plaintiff was discriminatorily denied tenure would allow Plaintiff to argue for reinstatement to a tenured position—as Plaintiff has done—whereas a successful retaliation claim, alone, would only allow Plaintiff to seek reinstatement to a non-tenured position because that was the post Plaintiff held when the alleged retaliation occurred. *See* Defs' Br at 10-11;

[9] Plaintiff claims that this portion of the reply somehow means that "Southeastern admits … to this Court" that retaliation obviates the need for sex discrimination review. *See* Pl's Mot. at 6. Defendants have admitted nothing of the sort, and instead have argued the opposite.

see also Harper v. Godfrey, 45 F.3d 143, 149 (7th Cir. 1995) ("One purpose of Title VII is to put a plaintiff in the same position … not in a better position.").[10]

This distinction carries over to front pay, which is simply money awarded in lieu of reinstatement. *See McInnis v. Fairfield Communities*, 458 F.3d 1129, 1145 (10th Cir. 2006). That is, if this Court upheld the district court's reinstatement denial, the district court's front pay calculation would have to be lowered if the retaliation claim stood alone, because only compensation for a non-tenured position would be appropriate. *See Harper*, 45 F.3d at 149. Plaintiff's sole response to this is to say that front pay will have to be recalculated anyway for "other reasons" Plaintiff brings on appeal, so this Court shouldn't worry about it. Pl's Mot. at 6. But aside from again assuming Plaintiff will prevail on those front pay issues, this ignores that the district court would have to operate differently on remand depending on whether it was addressing only a retaliation claim or sex discrimination claims, as well.

Neither would the retaliation claim sustain the same damages amount, as Plaintiff asserts (sans authority). Rather, the jury's general monetary award ($1.165 million, reduced to $360,040.77 pursuant to Title VII's statutory cap) would also be affected—and potentially thrown out—if only the retaliation claim survived because the jury awarded one lump sum for all three claims rather than separate amounts. Defs' Br. at

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[10] Defendants in no way concede that reinstatement of either stripe is warranted. The district court denied reinstatement for compelling reasons and that decision should be upheld. *See* Defs' Br. at 52-64.

24-25; P.A.Vol.2 at 72; *see Blanke v. Alexander*, 152 F.3d 1224, 1232 (10th Cir. 1998) ("Since the jury returned a general verdict on damages, the record provides us with no means of determining upon which of the factors the jury based its award …. Thus, if the permanent injury claim was improperly included, we must reverse the award of damages."); *Okland Oil v. Conoco*, 144 F.3d 1308, 1319 n.14 (10th Cir. 1998) ("[W]e have reversed and remanded cases where we were uncertain if the jury based its verdict on an improper theory."). In addition, if *Harris Funeral Homes* leads to the elimination of Plaintiff's underlying discrimination claims here, that decision could itself lead to the elimination of Plaintiff's retaliation claim. *See, e.g.*, *Essary v. Fed. Express*, 161 Fed. App'x 782, 786 (10th Cir. 2006) (unpublished) ("[I]t is far from clear whether a retaliation claim may be predicated upon a non-cognizable cause of action."). In sum, there are any number of reasons why a retaliation claim alone cannot sustain the entire verdict.

D. Plaintiff's other arguments against abatement are also without merit.

Plaintiff attempts to distinguish *Harris Funeral Homes* by pointing out that it was decided on summary judgment, whereas the present dispute involves discrimination *vel non* at trial. Pl's Mot. at 6. But again, Defendants have raised—and the Supreme Court's certiorari grant itself raises—legal questions, in addition to factual implications. And regardless, a pending Supreme Court decision does not have to be on all fours for a stay to be the prudent course. *See, e.g.*, *Landis*, 299 U.S. at 254. Moreover, Plaintiff's insinuation that a *prima facie* case and *vel non* analysis are somehow "different" enough to mean one case won't affect the other is illogical and unsupported by any of the cases

Plaintiff cites. There are plenty of realistic scenarios in which the Supreme Court's upcoming decision could affect this appeal. If the Court rules that Title VII covers transgender identity and reverses *Etsitty*, a substantial portion of Defendants' arguments are hindered. On the flip side, if the Court narrowly limits sex stereotyping claims by transgender individuals, then Defendants' appeal would be strengthened. Either way, this Court would risk its own decision being quickly superseded, after a significant waste of time and resources, if it moved forward now.

Plaintiff next points to the various "procedural hurdles" that could keep Defendants' sex discrimination claims from being heard on the merits. Defendants have already addressed these arguments in depth in their briefs. *See, e.g.*, Defs' Reply at 14 n.8 (definition of "sex"); *id.* at 17-19 (Rule 50(a) and 50(b)). Yet again, all of Plaintiff's justifications for vacating the abatement of this appeal simply ask the Court to assume that Plaintiff is correct on each and every dispute in this case—both big and small. That cannot be sufficient reason for this Court to reverse course. The Court instead has seen that Defendants' cross-appeal is straightforwardly implicated by the Supreme Court's impending decision, and abated the proceedings accordingly.

Plaintiff also claims that three other circuits' response to *Harris Funeral Homes* somehow "affirms that maintaining an abeyance in Tudor's appeal is simply unnecessary." Pl's Mot. at 8. But Plaintiff's own descriptions do not support this assessment. Indeed, the Eighth Circuit apparently abated its case with the consent of the same Lambda Legal counsel with whom Plaintiff wanted to share oral argument in

the present case. *See id.* For the Ninth Circuit case, Plaintiff offers little more than speculation that it "appears the Ninth Circuit has construed the certiorari grants narrowly." *Id.* at 9. The third case, in the Eleventh Circuit, is even more ambiguous, as Plaintiff admits that oral argument has not been set and no party has (yet) requested abeyance. *See id.* at 10. There is little to be gleaned from these cases.

Finally, Plaintiff claims abeyance is improper because of the equities at stake. Specifically, Plaintiff claims an abeyance "unnecessarily extends her deprivation of the tenured job she earned," thus "equity cannot justify depriving Tudor of her career even one moment longer." Pl's Mot. at 10-11. But the district court declined to order reinstatement, and Plaintiff has not shown that this was in any way an abuse of discretion; to the contrary, the reinstatement denial is supported by strong evidence. *See* Defs' Br. at 52-64. This evidence includes compelling testimony from the current English Department chair—whom Plaintiff not only called as a witness, but also explicitly vouched for as truthful and trustworthy—that reinstatement at this point would be detrimental to the English Department, the students, and Southeastern, and that reinstatement is opposed by "at least half of the faculty." Defs' Br. at 57-58. Once again, Plaintiff's argument on this score just assumes the Court will eventually agree with Plaintiff on everything, even if that means upending the district court's rulings.

Relatedly, Plaintiff claims that "the lingering effects of Southeastern's Title VII violations metastasize by the day and delay only exacerbates her injuries." Pl's Mot. at 11. Plaintiff, it is claimed, "is unemployed with diminishing savings … struggling to

cover basic living expenses … [and] prone to continue on that downward spiral unless this Court intervenes." *Id.* Time is of the essence, in other words, because Defendants "destroy[ed Plaintiff's] professional reputation, and effectively end[ed] her career." *Id.* at 2. But that is not what the facts show, nor is it what the district court found. To the contrary, after being terminated by Defendants Plaintiff taught for four years at Collin College at a similar salary, Defs' Br. at 12-13, and the district court found "no suggestion or any evidence from which [it] could determine that the discrimination at Southeastern … played a role in Collin College's determination to terminate Plaintiff." Defs' Br. at 66 (quoting P.A.Vol.5 at 47). Moreover, the district court found that Plaintiff's starting work at Collin College represented a "bright-line point at which … the effects of Defendant[s'] discriminatory acts ended." *Id.* (quoting P.A.Vol.5 at 80). Thus the claim that Plaintiff's current unemployment is a dire emergency caused by Defendants that needs to be remedied immediately is simply not supported by the record or the district court's findings. As sympathetic as Plaintiff might sound, this Court should not assume—as a preliminary matter—that the district court abused its discretion on these findings in order to move forward with a case that it otherwise should obviously stay.

Conclusion

Defendants are in a strange spot. Like Plaintiff, Defendants would like to see this case resolved soon because they believe this appeal will vindicate their position. But Defendants also cannot deny that *Harris Funeral Homes* will likely impact this case, for one side or the other, and therefore believe the Court sensibly decided to abate to avoid

wasting judicial and party resources in a premature endeavor. Issuing a stay was the responsible course because it promotes judicial economy and avoids piecemeal litigation. The Court should not reconsider its decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on May 13, 2019, I caused the foregoing OPPOSITION TO MOTION TO VACATE ABATEMENT ORDER to be filed with this Court and served on all parties via the CM/ECF filing system.

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