Case No. 23-10072

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHERYL BUTLER,

Plaintiff-Appellant,

v.

JENNIFER M. COLLINS; STEVEN C. CURRALL; ROY P. ANDERSON; JULIE P. FORRESTER; HAROLD STANLEY; PAUL WARD; SOUTHERN METHODIST UNIVERSITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

REPLY BRIEF OF PLAINTIFF-APPELLANT CHERYL BUTLER

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SUPPLEMENTAL FACTS

I. CHANGING COUNSEL

Tenure denial cases are notoriously difficult and few attorneys are skilled in this area. As is true in virtually every employment case, Butler was and remains financially vulnerable limiting her access to skilled counsel. Indeed, for a time, Butler and her husband were pursuing bankruptcy, narrowly avoided only because her husband retired early due to health problems giving them access to his pension.

It is true that Butler and Appellees went through different sets of lawyers throughout this proceeding. (Butler did not oppose any change of counsel sought by Appellees even when accompanied by requests for scheduling relief.). Because Appellees did not oppose substitutions of Attorneys Kennard and Barrett below (Br. at 30), Butler does not delve into the reasons behind their separation.

On appeal, Appellees suggest that Butler's termination of Attorneys Robinson in 2019 and Dunlap in 2022 were some kind of grand stratagem to cause delay in this litigation. To what end, Appellees do not say. Nonetheless, Appellees' bluster is belied by the record.

Attorney Robinson was terminated for cause in late 2019 after he repeatedly failed to produce discovery in this matter, missing deadlines that Appellees seized upon to seek sanctions against Butler. The record contains emails between Butler and Robinson in which she strongly directs him to comply with discovery obligations but he nonetheless refuses. ROA.1615. In the three sanctions hearings demanded by Appellees regarding that same discovery, the Northern District interrogated Robinson and he eventually admitted that he and his Firm's failed to comply with discovery requests over his clients' protests and improperly advised his client to not comply with proper demands. In one of those hearings, the Northern District unequivocally held that Robinson bore responsibility for discovery problems. ROA.3447–48. Appellees then, for reasons not captured by the record, abandoned that particular sanctions crusade.

Attorney Dunlap was terminated for cause in January 2022 on the day Butler learned he had sought an extension of time to docket summary judgment opposition on false pretenses and he otherwise had not prepared and had no way of possibly preparing the filings to meet the deadline he requested.

After Dunlap's first motion to withdraw was summarily denied, Butler sought reconsideration adducing declarations and exhibits under seal that corroborated the total breakdown in their attorney-client relationship starting in Fall 2021 (ROA.2311). Among other things, Dunlap tried to force Butler to use a mediator who was a current SMU Law employee. He also made several demands for money not due him under the retainer and threatened to withdraw if not paid. Dunlap also developed a habit of promising to do briefing work, including summary judgment filings, but never delivered. Butler also pointed to evidence that Dunlap's solo practice law firm was in serious financial distress and that, in addition to losing support staff, Dunlap repeatedly complained he did not have the capacity to prosecute her case unless she gave in to his snowballing demands.

Young also provided a sworn declaration pointing to evidence that Dunlap failed to perform necessary tasks on Butler's case and had filed an unauthorized motion to strike Butler's motion for scheduling relief (ROA.2291) in which he falsely claimed he had prepared summary judgment opposition filings and was ready to file them in less than 24 hours' time (ROA.2301). Additionally, Young pointed out that Dunlap

had a long history of misconduct problems as evidenced by no fewer than six public reprimands from the Texas Bar and several online complaints from then current clients echoing similar problems with Dunlap in other cases.

II. MULTIPLE DELAYS NOT CAUSED BY BUTLER

Appellees paint a false picture of the proceedings below, casting blame on Butler for scheduling adjustments for which she bears no blame. Gallingly, Appellees also fail to fess up to how their own scorched earth litigation tactics consumed inordinate judicial resources and created delay.

For instance, Appellees sought to remove this case, filed in state court in August 2018, in January 2019 long past the federal deadline for removal and after having missed deadlines in the state court.

Appellees make much of Butler's difficulties navigating their 2019 motion for sanctions accusing her of personally withholding discovery. What they fail to mention is that Butler blamed Robinson because he was, as the Northern District found, personally at fault for the vast majority of issues grieved.

Appellees also curiously omit that a striking number of the discovery demands they sought compelled were actually documents they already had or that were in their own possession. For instance, they demanded production of Butler's charge of discrimination which was an exhibit to her complaint. Appellees also demanded Butler produce her tenure box which in 2019 SMU averred it did not possess and insisted Butler must have it, but which in 2022 SMU claimed it had it all along and had produced it to Butler long before the 2019 motion/

Echoing the callous disregard SMU had for Butler's health challenges as an employee, Appellees now insist that Butler caused delay because she was unable to appear in person at one of the three show cause hearings held in late 2019 pertaining to discovery issues (Br. at 32–33). And yet, the record reflects, and the Northern District held, that Butler was excused because she had legitimate medical problems that kept her from traveling from Houston (her home) to Dallas (where the Northern District sat) as evidenced by medical documentation in the record.Further, the Northern District found that Butler timely notified Robinson of this conflict but that he chose to not docket Butler's request

for extension until after the hearing had started, a dereliction of his duty to his client.

Appellees strikingly leave out that some extensions of time were triggered by their own counsels' change of firm. For instance, the parties jointly sought extensions for discovery and mediation in late 2021 largely due to Appellees' lead trial counsel, Ms. Askew, changing firms and additional time needed to substitute new counsel in.

Appellees also fail to accept responsibility for the delays caused by their own litigation tactics. For instance, the extension secured in Fall 2021 turned out to be too short because Appellees consumed inordinate time trying to force Butler privately, then via motion to compel seeking sanctions, to use a current SMU Law employee as mediator (ROA.1805). Appellees' motion to compel, which also accused Butler of trying to harm Appellees by delay, consumed significant resources. The Northern District ultimately denied the motion summarily via electronic order (ROA.21) just one month before dispositive motions were due.

Appellees also omit that when Butler tried to confer in advance of filing her Rule 56(d) motion seeking production of her tenure box, Appellees insisted it had been produced and yet took the absurd position

that it would not identify the production by bates number. (They maintain that same position on appeal.)

REPLY ARGUMENT

I. THE SUMMARY ORDERS ARE PROBLEMATIC.

Several of the orders appealed are summary, providing no rationales at all for the Northern District's decisions. A subset of them, such as summary judgment and Butler's Rule 56(d) motion, were later supplemented with written decisions, albeit many months after the orders issued. Other orders, like Dunlap's motion to withdraw, Appellees insist were explained months after the fact at a hearing.

The requirement that trial courts provide rationales for their orders is inviable. The rationales rule is not window dressing. It is an indispensable safeguard that ensures trial courts soundly and fairly assess the motion before them. "A statement of reasons is one of the handmaidens of judging. Where a district court fails to explain its decision [], we do not know whether the decision was within the bounds of its discretion or was based on an erroneous legal theory." *Schwartz v. Folloder*, 767 F.2d 125, 127 (5th Cir. 1985).

This Circuit should reject Appellees' invitation to excuse the Northern District's summary orders on the pretense that some rationales were provided months after the fact either via written order or in the form of statements at hearings.

The sheer number of summary orders entered in this case by Judge Brown during her tenure on this case between late 2019 and early 2023 further evidences a court that did not apprehend the limits federal courts must abide.

Moreover, a court that signals or summarily decides motions, and only later provides its rationales, runs the serious risk of imprudent wholesale adoption of a party's position. The Supreme Court explains as much in *United States v. El Paso Natural Gas Co.*, advising trial courts should

> Avoid as far as they possibly can simply signing what some lawyer puts under their noses. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeal they won't be worth the paper they are written on as far as assisting the courts of appeals in determining why the judge decided the case.

376 U.S. 651, 657 n.4 (1964).

That risk is heightened where, as happened below, the trial court summarily adjudicates the motion then, after significant delay, pronounces post hoc rationales. "The potential for overreaching and exaggeration on the part of attorneys," is frequently exhibited when they urge findings of fact after learning that the judge decided in their favor. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985).

Lastly, caselaw does not support treating discretionary decisions any differently than merits decisions. Discretionary issues, including trial management, are entrusted to the sound discretion of the trial court which cannot act arbitrarily. *Schwartz v. Folloder*, 767 F.2d 125, 127 (5th Cir. 1985). "At minimum, the district court must listen to the party's arguments and give its decision." *Id.*

II. THE RULE 6(B)(1) SUMMARY DENIAL IS AN ABUSE OF DISCRETION.

Even if post hoc rationales are considered, they evidence discretion abused. The Northern District's statements at the March 2023 hearing evidence it had operated unaware of the fact that it must have stated rationales for its decisions. At the hearing the Northern District repeatedly insisted it was not obliged to provide Butler with rationales

for "any decision" it made in this case. When corrected by counsel, the Northern District doubled down insisting the Fifth Circuit had no such rule, and castigated counsel for not knowing "how things are done in Texas." Taking Judge Brown at her word, that she believed no rationales were necessary, its hardly a leap to conclude it failed to establish any rationales for its summary denial months earlier.

Other purported rationales proffered at the March 2023 hearing undercut the propriety of denying the Rule 6(b)(1) motion in the first place. Among other points, Judge Brown blamed Butler for discovery problems Brown had previously held to be the fault of terminated counsel Robinson. Bizarrely, Judge Brown also insisted that an extension motion filed by Dunlap without Butler's knowledge or consent was filed in "bad faith" and should not have been granted (despite the fact that it was granted) which was then purportedly held against Butler on the third extension motion.

Appellees posturing about the harms of delay ring hollow on this record. They make only general points about the importance of deadlines and respect for litigants and courts. They do not, because they cannot, establish why Butler being afforded additional time in light of Dunlap's

total dereliction of his responsibilities as counsel would have prejudiced SMU (Resp. Br. at 62).

Appellees' purported concern that granting Butler's extension would have somehow undermine all trial courts power manage their dockets is hyperbolic (Resp. Br. at 62–63). It also reflects a fundamental misapprehension of the overarching aim of civil litigation. Schedules are not suicide pacts. They are set, adjusted, and reset throughout litigation. Deadlines are important, but only insofar as they facilitate the adjudication of cases on the merits. *See Sun Bank v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) ("The Federal Rules of Civil Procedure are designed for the just, speedy, and inexpensive disposition of cases on their merits, not for the termination of litigation by procedural maneuver.")

Moreover, Appellees miss that all Professor Butler wanted to do was docket merits opposition to summary judgment with a modest request to give her new counsel time to put together filings Dunlap failed to produce in the time originally afforded. That would have given both Butler and Appellees the satisfaction of having a federal court determine whether, on the merits, there was anything to her case. That

accommodation would, no doubt, have resulted in a merits opinion in the most efficient and expeditious manner possible under the circumstances. Instead, Appellees chicanery dragged out these proceedings and forced Butler to call upon this Circuit to reiterate basic Circuit law like a discretionary decision must be accompanied by stated rationales at the time it is made.

This Circuit should not overlook that Appellees' own requests for scheduling relief on appeal undermine their argument that they are prejudiced by delays of any kind. Just days before Appellees' Response was due, they moved (and Butler did not oppose) for a 21-day extension of time. The reason? Their chosen counsel's personal and professional obligations left her without capacity to complete the Response by the original deadline. Ostensibly, Appellees found themselves in the exact position Butler was below at summary judgment. Opposition briefing was due, and by no fault of the parties, extension was necessary because counsel was unprepared. Strikingly, the period of extension sought (and granted) in this Circuit is the same that Butler requested below—an additional 21 days.

III. DUNLAP'S WITHDRAWAL SHOULD HAVE BEEN GRANTED.

As with Butler's Rule 6(b)(1) motion, the Northern District abused its discretion by summarily denying Dunlap's withdrawal without providing any rationales supporting that decision.

At the threshold, Appellees should not be able to make arguments in opposition to Dunlap's first motion to withdraw on appeal. Though at conferral Appellees asserted they opposed withdrawal, they failed to docket any opposition and made no argument to the Northern District before the motion was summarily denied, waiving argument on appeal.

Appellees try to save face by insisting that the Northern District had legitimate reasons to deny the withdrawal. Those rationales are a combination of bald assertions made by both Appellees' counsel and the Northern District months after withdrawal was denied. Even if this Circuit were to consider the post hoc rationales Appellees drum up, they cannot cure the patent abuse sown in denying Dunlap's withdrawal.

For the sake of completeness, Butler terminated Dunlap for cause, not to secure some unspecified litigation advantage. Unsubstantiated

supposition from Appellees' counsel, let alone the Northern District's reliance on it, is not evidence of the merit of the withdrawal motion.

Moreover, actual record evidence makes plain Dunlap's termination was necessary under the circumstances. The reconsideration motion presented considerable evidence backing up the fact that Butler terminated Dunlap for failing to do his job and goings on that smack of misconduct. Taken together with Dunlap's record of public reprimands and other client complaints that track on to Butler's experiences with him, the record supports that Butler terminated Dunlap because it was necessary, not to secure some unspecified litigation advantage.

The fact that Butler also terminated another lawyer, Robinson, does not evidence a pattern of terminating counsel as a litigation stratagem (contra Resp. Br. at 53). Glaringly, Appellees fail to mention that Robinson also failed to do his job as evidenced by the Northern District's findings that Robinson was at fault for missing discovery production that Appellees had urged (but later abandoned) Butler be sanctioned for personally.

Appellees insistence that Dunlap's presence was necessary because without him the April 2022 trial setting would be missed also falls flat.

Delay in and of itself is not necessarily prejudicial. Moreover, Appellees assume, without support, that Dunlap would have miraculously risen to the occasion, worked on filings, and provided not just meaningful but perform substantial work on Butler's behalf despite the total breakdown in attorney-client relations and Dunlap's by then pattern of promising to do work but failing to deliver. But the proof is in the pudding. Dunlap performed no substantial work on this case after he filed his motion to withdraw despite it being denied.

IV. BUTLER'S STATE LAW TORT CLAIMS ARE COGNIZABLE.

Appellees' contention that the TCHRA silently abrogates Texans' right to redress reputational injuries via tort because it is a comprehensive employment discrimination statute is a nonstarter. The THCRA does not foreclose state law tort claims against persons one works with for certain torts. Butler's opening brief points to binding Texas Supreme Court precedent which, on this *Erie* posture, is controlling.

Additionally, Appellees fail to account for the constitutional dimension of reputational torts under Texas law. Since statehood, Texans' right to protect their good reputation has been constitutionally

guaranteed. *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) (quoting Tex. Const. art. I §8 ("Every person shall be at liberty to speak, write or publish his opinion on any subject, being responsible for the abuse of that privilege."); Tex. Const. art. I, § 13 ("All courts shall be open, and every person for an injury done to him, in his . . . reputation, shall have remedy by due course of law.")). Because Texans are guaranteed the right to bring reputational torts, the TCHRA cannot preempt them. Guarantees expressly afforded by Texas' charter cannot be abrogated by statute. Indeed, if the TCHRA were read to do so, the statute would be unconstitutional. *Cf. Duncan v. Gabler*, 147 Tex. 229, 233–34 (1948).

Turning to Title VII caselaw, as Appellees' urge, is no help. Butler agrees that the TCHRA and Title VII claims are roughly governed by the same law. *Gorman v. Verizon Wireless*, 753 F.3d 165 (5th Cir. 2014). But neither statutory regime provides for individual liability. *See, e.g., Graft v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994). Because the statutory regimes do not impose individual liability, whereas the reputational torts only seek individual liability, they are distinct for preemption purposes.

Appellees' gravamen argument also falls flat. Butler's tort claims seek to redress the slew of untrue statements made by Individual

Defendants while she worked at SMU. The disparaging statements made by Individual Defendants injure Butler separate and apart from any adverse actions or retaliation made against her by SMU.

As a law professor and lawyer, it is inherently damaging to be falsely accused by any person as making false complaints, lying about illness, and being hysterical (to name just a few examples). Reputational injury is unlike any other. As Justice Rehnquist explains with the help of Shakespeare in *Milkovich v. Lorain Journal*,

> Good name in man and woman, dear my lord.
> Is the immediate jewel of their souls.
> Who stelas my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

497 U.S. 1, 12 (1990) (quoting WILLIAM SHAKESPEARE, OTHELLO, act 3, sc. 3). Indeed, SMU teaches its students to carefully guard their reputations. As just one recent example, trustee Mike Bone advised the graduating class of 2018,

> Your reputation for integrity will be the most important credential you ever will have with you when you go into the marketplace and when you go into your community. Your reputation for integrity will open doors for you. On the other

> hand, no one—no one—will want to be involved with you if your integrity is in question.

SMU, Deadman School of Law Hooding Ceremony at 20:24, YouTube (May 19, 2018), https://www.youtube.com/watch?v=tRG5i--5ZMI.

That hiring and reputational injuries are distinct causes of action is nothing new. Appellees overlook Supreme Court caselaw recognizing that hiring decisions and reputational torts can be brought simultaneously because they redress different injuries. One example is *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). There, the Supreme Court observes that if a university both declines to rehire a professor and lodges charges against her that might seriously damage her standing and associations in the community, there are two distinct causes of action available. One cause for the hiring decision, and another to challenge the defamatory accusations (e.g., that the professor was dishonest or immoral). This is so even where the hiring decision is premised on accusations that the professor is dishonest or immoral. *Roth*, 408 U.S. at 573. Injury to one's reputation is separate and distinct from the adverse employment action, thus necessitating a separate cause of action to confront the defamation head on.

Appellees misread *Hoffman-La Roche, Inc. v. Zatlwanger* (Resp. Br. at 45). That case limitedly recognizes that judge-made, "gap-filler" torts cannot be brought where there is a state statutory scheme that redresses the same injury with specific limits on recovery. That limitation is special to judge-made torts, like the intentional infliction of emotional distress one at issue in *Hoffman-La Roche.* 144 S.W.3d 438, 448 (Tex. 2004). Butler's reputational torts are distinguishable because they are constitutionally guaranteed, not judge-made.

Lastly, Appellees' respondeat superior and official capacity arguments are inapt. The Texas Constitution obliges all Texas to not abuse their privilege of speech by means of making false statements that impugn the reputation of another without exception. Tex. Const. art. 1 § 8 ("[e]very person"). Conspicuously, Appellees cite no case supporting the notion that respondeat superior doctrine forecloses tort liability against employees in their official capacity.

V. Butler's Disability Claims Are Cognizable.

Appellees brazenly urge on appeal that Professor Butler's federal segregation in the workplace and associational discrimination claims are uncognizable. Appellees contend the claims are not viable l because this Circuit has not to Appellees satisfaction affirmatively recognized the existence of these two forms of discrete act disability discrimination in published opinions. Critically, they miss that both the associational and segregation claims are expressly established by the statutory text.

Provisions of the ADA and the Rehabilitation Act expressly define discrete act disability discrimination to encompass segregation in the workplace and associational discrimination. 42 U.S.C. §12212(b)(1) (segregation in the workplace); 42 U.S.C. §12112(b)(4) (associational discrimination). Because the statutory language unambiguously makes segregation and associational claims cognizable the judicial task ends there. *Legacy Community Health Services v. Smith*, 881 F.3d 358, 374–75 (5th Cir. 2018) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)).

Appellees' separate argument, that Professor Butler would have lost these claims on the merits, is a nonstarter on this posture. At

summary judgment, Appellees narrowly attacked the segregation and associational claims as a matter of law. A direct consequence of that litigation strategy is that on appeal, Appellees may not surface for the first time arguments not made below. *State Indus. Products Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 456 (5th Cir. 2009). *See also Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005) (recognizing well settled Circuit law limiting review of summary judgment "to matters presented to the district court").

VI. Butler's Tenure Box Is MIA.

Appellees did not produce Butler's tenure box below, admitted as much on the record, and when faced with a Rule 56(d) motion seeking production failed to respond, waiving all of the arguments they raise in Response.

Even if Appellees' arguments are considered, they wildly miss the mark. Indeed, on their own terms, Appellees' assertions coupled with the record below make crystal clear Butler's tenure box is critically necessary evidence in this case and was never produced.

Below, the Northern District insisted that Butler's Rule 56(d) motion had been denied because it found as fact that the tenure box had

been produced in discovery as evidenced by the fact that it was included in Appellees' summary judgment appendix. That finding is infirm because, despite Judge Brown's insistence that she "read it," the tenure box is not in Appellees' summary judgment appendix. Appellees' utter silence on that point speaks volumes.

Appellees next argument, that being made to identify the tenure box by bates number is too onerous and unsupported by caselaw is absurd. The Northern District's "finding" that it would have been malpractice for Appellees' trial counsel to identify the tenure box by bates number is no help. Among other authorities, Rule 26(a)(1)(A)(ii) requires initial disclosure of evidence in a party's possession pertinent to the case. And attorneys in the Northern District are obliged to consent to requests for cooperation in discovery. *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 287–88 (N.D. Tex. 1988).

Appellees' suggestion that it was harmless to not produce Butler's full tenure box in this litigation is contrary to law. Federal regulations require SMU to retain all of Butler's employment records through the termination of this litigation. 29 CFR § 1602.14. Indeed, in most cases like this, SMU's failure to produce would give rise to a negative inference

at trial. *See, e.g.*, *Whitt v. Stephens County*, 529 F.3d 278, 284–85 (5th Cir. 2008) (court may "assume facts against a party that destroys or loses evidence subject to a preservation obligation").

Appellees' insistence that Butler's tenure box need not be produced under Rule 56(d) because it is unnecessary evidence in this tenure denial case strains credulity. The crux of SMU's defense at summary judgment is that Butler did not merit tenure because the evidence of her qualifications in her tenure box missed the mark. As movants, Appellees pointed to sworn testimony from decisionmakers all of whom stated SMU's rules required review of the tenure box at each level and they had all personally reviewed Butler's tenure box. Thus, by their own admission, the total contents of Butler's tenure box are "substantive" and thus necessary.

Perhaps most concerning of all is that Appellees fail to grapple with the fact that their trial counsel admitted in open court in 2019 that SMU did possess Butler's tenure box. Indeed, that was why, SMU argued at the time, it sought to compel Butler to produce it with sanctions. And yet, in 2021 that same lawyer, Ms. Askew, insisted via email that the tenure

box had been produced prior to the 2019 hearing. Both statements cannot be true.

VII. APPELLEES DID NOT CARRY THEIR RULE 56(C) BURDEN.

The Northern District should not have categorically treated each and every of Appellees' assertions of fact as undisputed. Rule 56(e) does not relieve movants of their Rule 56(c) burdens.

Below, the Northern District erroneously held that because summary judgment was unopposed, it should treat "Defendants' facts as undisputed" (ROA.3130). It gave two reasons supporting that decision. First, it construed the absence of opposition filings to mean there was no evidence in the record supporting Butler's claims. Second, it reasoned that with no filings, there could be no "objections to Defendants' summary judgment evidence" (ROA.3130).

On appeal, Appellees invoke Rule 56(e). But that rule does not operate the way Appellees insist it does. Yes, 56(e) allows a trial court to construe asserted material facts that go unchallenged as undisputed. But only if the movants' proffer satisfies the evidentiary burden in Rule 56(c).

The appropriate precedent is *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). There the Supreme Court holds that Rule 56(e) does not

modify the moving party's burden pursuant to Rule 56(c) "to show initially the absence of a genuine issue concerning any material fact." *Id.* at 159. Where the movants' initial burden is not discharged, they are not entitled to summary judgment. The fact that no opposition was filed is of no moment because "no defense to an insufficient showing is required." *Id.* at 161 (cleaned up).

The Northern District did not scrutinize Appellees' proffers, let alone assess whether they were sufficient to discharge Rule 56(c) production burdens. Instead, the Northern District wholesale adopts Appellees' position on material facts because the motion is unopposed (ROA.3130). *But see Miranda v. Bennett*, 322 F.3d 171, 177 (2d Cir. 2003) (the "very nature of advocacy creates a need for the court to be wary of wholesale adoption of a party's proffers"). This is not a means to ascertain whether there are any genuine issues of material fact. A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (cleaned up). The Northern District did not assess if there were any other interpretations of Appellees' own evidence which is improper.

The Northern District's faulty analysis is plain as day in claims it dismissed which Appellees challenged on a factual basis. The opinion deems claims Appellees attack on a factual basis as a loss for Butler because she does not point to evidence to the contrary. For instance, with respect to Butler's breach of contract claim, the Northern District held that even if there were evidence of breach of contract on the record, it declined to "to find such evidence and has no obligation [to do so]" (ROA.3136). That is erroneous.

The Northern District shirked its responsibility to both review the evidence Appellees proffered and to determine whether it actually established that there were no genuine issues of material fact that arise from Appellees' own evidence. Appellees' mere assertion that no disputes exists misses the mark.

The lower court's error is illustrated well by its assessment of Butler's qualification for tenure. The Northern District dismissed multiple claims grieving illicit tenure denial on the pretense that there was no evidence Butler was qualified for tenure. It reached that conclusion on the pretense that the letters SMU issued Butler from

various tenure decisionmakers stated tenure was denied because she was not qualified in teaching. *See, e.g.*, ROA.3141.

The Northern District confused its role in assessing Appellees' proffer. Appellees had to do more than just confirm they provided a purportedly nondiscriminatory rationale for denying Butler tenure. They must adduce evidence so strong that no reasonable jury could return a verdict for Butler on this record. They failed to do so for several reasons.

First, the decisionmaker letters contain statements indicating that issues not pertinent to one's qualifications for tenure were taken into account in the decisions. For instance, the Tenure Report accuses Butler of being "untruthful in her dealings" with colleagues and SMU administrators, insists Butler mischaracterized things the Committee told Butler to others" (ROA.3124). It goes on to accuse Butler of making false accusations against "our Dean and Provost, that are demonstrably not true" (ROA.3124). Also concerning is that the Tenure Report discloses Butler was then on FMLA leave (ROA.2009).

A reasonable jury could readily infer that those inflammatory attacks on Butler's character and inexplicable disclosure of her medical status, which have nothing to do with her acumen as a teacher, give rise

to an inference that Butler was not assessed solely on the basis of her qualifications in teaching and scholarship as SMU's rules required.

Second, the decisionmaker letters evidence alarming procedural irregularities and outright rule violations in Butler's tenure process. Those procedural irregularities are in and of themselves sufficient to send the tenure denial claims to a jury for resolution on the merits. *Tanik v. Southern Methodist University*, 116 F.3d 775, 776 (5th Cir. 1997) (one of several means of satisfying *prima facie* case).

Appellees' evidence abounds with procedural irregularities including the dissolvement of Butler's committee and reconstitution anew while the tenure cycle was ongoing, Dean Collins adjudicating Butler's appeal despite SMU's rules requiring its presentment to the faculty, and Collin's own denial letter being issued 93 days past the deadline established by SMU's rules. *See* Op. Br. at 18–24.

Third, SMU withheld evidence necessary to foreclose the possibility that their proffered nondiscriminatory rationale is its true rationale. Butler's missing tenure box is key in large part because the decisionmaker letters purport to base their determinations on assessment of the materials in Butler's tenure box. They also purport to

quote from scathing student and teaching evaluations SMU claims it held against Butler. Because Appellees did not proffer the tenure box, it is impossible to ascertain whether the letter writers actually and accurately assessed the materials as they claimed. To be clear, Butler is not asking this Circuit to sit as a super tenure committee. She aks only that meaningful scrutiny is afforded. *Tanik*, 116 F.3d at 776 ("tenure decisions are not exempt from judicial scrutiny").

VIII. THIS CASE MERITS REASSIGNMENT.

With the upmost respect for this Circuit and the Northern District, the proceedings below fall woefully short of the neutral, tempered, and respectful adjudication both Butler and Appellees are due. This is not a request for special treatment. Butler seeks only the full and fair opportunity to make her case in a fair and impartial forum.

United States v. Jordan, 49 F.3d 152, 155 (5th Cir. 1995).

Butler agrees with Appellees that *In re DaimlerChrysler* is on point. There this Circuit holds that reassignment is appropriate where the record below evidences such hostility towards one side that "it would be exceedingly difficult for the district court to regain some impartiality

in this case." 294 F.3d 697, 701 (5th Cir. 2002). *DaimlerChrysler* points in favor of reassignment below.

Taking the record as a whole, it is not difficult to discern that Judge Brown is simply incapable of looking at Butler, her chosen counsel, and this case with fresh eyes.

From the early days of her assignment up through issuance of final judgment, Judge Brown threatened Butler personally with sanctions. That sanctions were never issued is besides the point. Judge Brown's ever escalating threats, personal attacks, and derisive comments served no purpose but to intimate Butler and her counsel into giving up altogether. That abuse only escalated once Butler's counsel made known that appeal was imminent.

The five lengthy transcripts of hearings conducted by Judge Brown speak volumes. With few exceptions, Judge Brown took every opportunity and then some to denigrate and intimidate Butler first, consider whether that chewing out was merited later (if ever). The same goes for Butler's chosen counsel, Young.

Butler respects the difficult job trial courts judges are tasked with. And yet, it is incumbent on Judge Brown and every other federal judge

to disentangle their personal feelings about a litigant or lawyer from their duty to vindicate the majesty of law. *See Offutt v. United States*, 348 U.S. 11, 14 (1954).

Even if Judge Brown's orders or affirmed in part, the optics of the proceedings below still merit reassignment. A judge that insists she's reviewed evidence never presented, expresses partiality for counsel based in Texas reflexively, and who categorically and repeatedly declares a case is meritless and a waste should not continue to hear the case after appeal.

"[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The judiciary cannot function if proceedings are slated. Not only is it beneath the dignity of federal courts. It undermines the "public's confidence in the impartiality of our judges and the proceedings over which they preside." *Jordan*, 49 F.3d at 155.

A reasonable and objective person, knowing all the facts, would undoubtedly doubt Judge Brown could be impartial going forward. That in and of itself merits reassignment. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860–61 (1988). In a situation like this one, "avoiding the appearance of impropriety is as important in

developing public confidence in our judicial system as avoiding impropriety itself." *Jordan*, 49 F.3d at 155–56.

CONCLUSION

For all of the foregoing reasons, Butler asks that this Circuit reverse all orders appealed and urges that this case be remanded to the Northern District of Texas with direction that it be reassigned.

Dated: July 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 7, 2023, I electronically filed the foregoing Brief for Plaintiff-Appellant Professor Cheryl Butler using the Court's CM/ECF systems, which constitutes service under the Court's rules.

/s/ Ezra Young
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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this Brief has been prepared in Microsoft Word using 14-point, proportionally spaced font, and that based on word processing software, the brief contains 5,936 words, excluding items that do not count towards the word limit pursuant to Fed. R. App. P. 32(f).

Date: July 7, 2023

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