IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 7:16-cv-54-O
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO DR. RACHEL TUDOR'S MOTION TO INTERVENE

As this Court is aware, the United States has filed suit against Southeastern Oklahoma State University in the Western District of Oklahoma, alleging that it violated Title VII by denying a transgender professor promotion and tenure. Dr. Rachel Tudor, the professor in question, has intervened in that case to allege that she was also subjected to a sexually hostile work environment and other forms of sex discrimination, including the denial of access to appropriate bathroom facilities. Dr. Tudor now moves for permission to intervene here. Defendants oppose that motion.

BACKGROUND

In March 2015, the United States filed a two-count complaint against Southeastern Oklahoma State University and its parent, the Regional University System of Oklahoma, alleging discrimination on the basis of sex and retaliation, both in violation of Title VII. Compl., *United States v. Southeastern Oklahoma State University* ("*Tudor*"), 5:15-cv-324, ECF. No. 1 (W.D. Okla. Mar 30, 2015). The discrimination claim was grounded in allegations that Dr. Rachel Tudor, a professor in the English Department, was denied promotion and tenure, and the

opportunity to reapply for same, because she is a transgender woman. *Id.* ¶¶ 71-73. Dr. Tudor intervened to present three claims: a hostile work environment, sex discrimination, and retaliation, all in violation of Title VII. Compl. in Intervention, *Tudor*, 5:15-cv-324, ECF. No. 24 (W.D. Okla. May 5, 2015). Dr. Tudor's hostile work environment and sex discrimination claims both included allegations that she was forbidden from using the women's restrooms, which was not at issue in the United States' complaint. *Id.* ¶¶ 144-45, 148, 166, 169-70.

The defendants in *Tudor* filed a motion to dismiss Dr. Tudor's hostile work environment claim for failure to state a claim on which relief can be granted, among other grounds. Defs.' Mot. to Dismiss, *Tudor*, 5:15-cv-324, ECF No. 27 (W.D. Okla. May 26, 2015). Rejecting that argument, the *Tudor* court found that although it was bound by the holding of *Etsitty v. Utah Transit Authority* that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual," *Etsitty* had also made clear that "like all other employees, such protection [against sex discrimination] extends to transsexual employees . . . if they are discriminated against because they are male or because they are female." *Tudor*, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015) (quoting *Etsitty*, 502 F.3d 1215, 1222 (10th Cir. 2007)). The *Tudor* court noted that, as *Etsitty* acknowledged, *see* 502 F.3d at 1222 n.2 (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)), transgender individuals could pursue a claim of sex discrimination under the sex-stereotyping theory recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and concluded that Dr. Tudor's hostile work environment claim was indeed predicated on her employer's disapproval of gender non-conforming behavior because "the actions Dr. Tudor alleges Defendants took against her were based upon their dislike" of the way in which she "presented [her] gender." *Tudor*, 2015 WL 4606079, at *2. The case entered discovery and was

set for trial in November 2016. *See* Order, *Tudor*, 5:15-cv-324, ECF No. 57 (W.D. Okla. April 27, 2016).

This case was filed on May 25, 2016 by a group of plaintiffs including the State of Oklahoma, challenging the validity of a series of documents published by federal agencies. *See* Compl., ECF No. 1. On August 21, 2016, this Court issued a Preliminary Injunction pursuant to which Defendants are enjoined from (1) "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," (2) "initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex," and (3) "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order." Order at 37, ECF No. 38.[1]

As they have explained at greater length elsewhere, the Federal Defendants do not understand this Court's Preliminary Injunction to interfere with the United States' ability to proceed in *Tudor* because that litigation was initiated prior to the issuance of this Court's Preliminary Injunction, and because the United States has not raised any claim turning on Dr. Tudor's access to restrooms or similar facilities, and is not requesting a change to the current facilities access policies that the Regional University System of Oklahoma has presented in that case. Nonetheless, out of an abundance of caution, after this Court's Preliminary Injunction issued the United States requested—and the *Tudor* court granted—a stay of all discovery deadlines in the *Tudor* case until this Court clarifies whether its Preliminary Injunction had any

[1] The Court used the term "Guidelines" to refer collectively to six specific documents: (1) a 2010 Dear Colleague Letter issued by ED's Office for Civil Rights ("OCR") regarding harassment and bullying; (2) an April 2014 ED OCR Guidance Document regarding sexual violence; (3) a December 2014 memo issued by then Attorney General Eric Holder; (4) a June 2015 OSHA Best Practices guide; (5) a May 3, 2016 EEOC fact sheet; and (6) a May 13, 2016 Dear Colleague Letter on transgender students issued jointly by ED and DOJ. Order at 3 n.4, ECF No. 38.

effect on the United States' ability to proceed in that case. Order, *Tudor*, 5:15-cv-324, ECF No. 123 (W.D. Okla. Sept. 6, 2016). Dr. Tudor has now moved for permission to intervene in this case.

ARGUMENT

A court may grant permissive intervention to a party who "has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), but Dr. Tudor does not assert any such claim or defense.[2] The main action here concerns a challenge to six specific documents produced by various federal agencies; Dr. Tudor had no part in the creation or distribution of those documents. Dr. Tudor has already filed her claims against Southeastern Oklahoma State University and the Regional University System of Oklahoma in the U.S. District Court for the Western District of Oklahoma, and she does not intend to refile them here. Instead, Dr. Tudor seeks to assert a claim under the Declaratory Judgment Act regarding the preclusive effect of the *Tudor* court's opinion denying the defendants' partial motion to

[2] Although Dr. Tudor seeks permissive intervention under Federal Rule of Civil Procedure 24(b)—rather than intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)—the Court may still consider whether her interests are adequately represented by other parties. *See, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) ("When acting on a request for permissive intervention, a district court should consider, among other factors, whether the intervenors are adequately represented by other parties and whether they are likely to contribute significantly to the development of the underlying factual issues. . . . When a proposed intervenor possesses the same ultimate objectives as an existing litigant, the intervenor's interests are presumed to be adequately represented absent a showing of adversity of interest, collusion, or nonfeasance."); *New Orleans Public Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (same); *Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994) (finding that district court did not abuse discretion in denying request for permissive intervention because "the proposed intervenors' interests were adequately being represented by the defendants in the case and that adding them to the lawsuit would needlessly increase costs and delay disposition of the litigation"). "The test in the Fifth Circuit is that 'when the party seeking intervention has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene, unless the applicant-intervenor demonstrates adversity of interest, collusion, or nonfeasance.'" *Jones v. Caddo Parish Sch. Bd.*, 204 F.R.D. 97, 101 (W.D. La. 2001) (quoting *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 757 (5th Cir.1995)). As a general matter, when the existing parties include "a governmental body charged by law with protecting the interests of the proposed intervenors," the presumption of adequate representation is particularly pronounced. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *see also Jones v. Caddo Parish Sch. Bd.*, 704 F.2d 206, 221 n.25 (5th Cir. 1983); *Graham v. Evangeline Parish Sch. Bd.*, 223 F.R.D. 407, 435 (W.D. La. 2004); *Lelsz v. Kavanagh*, 98 F.R.D. 11, 17 (E.D. Tex. 1982). Dr. Tudor has not overcome this presumption—indeed, any interest that Dr. Tudor has in this case is adequately represented by the United States.

dismiss her complaint. Dr. Tudor would argue that principles of collateral estoppel, also known as issue preculsion, bar "the State of Oklahoma . . . from arguing and otherwise re-litigating," in this or any other case, the question of "whether Dr. Tudor . . . can claim and otherwise seek relief under Title VII." Proposed Compl. in Intervention, ECF No. 67-1, ¶ 54.

Dr. Tudor's motion should be denied because her proposed claim would not survive a motion to dismiss. "An application to intervene should be viewed on the tendered pleadings—that is, whether those pleadings allege a legally sufficient claim or defense . . . ." *SEC v. Prudential Securities Inc.*, 136 F.3d 153, 156 n.4 (D.C. Cir. 1998) (quoting *Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey), Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988)); *Patterson v. Shumate*, 1990 WL 122240, at *2 (4th Cir. Aug. 27, 1990); *accord* Wright, Miller & Kane § 1914 (to support intervention, "[t]he proposed pleading must state a good claim for relief or a good defense"). Where the petitoner's proposed claim would not survive a motion to dismiss, the petitioner is not eligible to intervene. *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1130 n.5 (5th Cir. 1983) (upholding denial of intervention where petitioner would assert futile claim); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3d Cir. 1982) (same); *In re American White Cross, Inc.*, 269 B.R. 555, 560 (D. Del. 2001) (upholding decision "denying [a] motion to intervene as futile"); *Ceribelli v. Elghanayan*, 1994 WL 529853, at *4 (S.D.N.Y. Sept. 28, 1994) (denying permissive intervention "on the . . . basis of legal futility"); *see also Lake Inv'rs Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1258 (7th Cir. 1983) ("In evaluating the motion to intervene, the district court must accept as true the non-conclusory allegations of the motion and cross-complaint.").

The claim that Dr. Tudor proposes to litigate here would not survive a motion to dismiss because collateral estoppel—that is, issue preclusion—attaches only when a case has been

litigated to final judgment, which the case in the Western District of Oklahoma has not. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995) ("According to the doctrine of collateral estoppel, or issue preclusion, 'when an issue of ultimate fact has once been determined by *a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit.'" (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (emphasis added)), *overruled on other grounds by Husky Int'l Elecs., Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 (5th Cir. 1986) ("As we said in *International Union of Operating Engineers v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676 (5th Cir.1981), '[t]he requirement of finality applies just as strongly to collateral estoppel as it does to res judicata.'"). A district court's denial of a partial motion to dismiss, which Dr. Tudor asks this court to grant preclusive effect, is an interlocutory ruling, not a final judgment, and does not give rise to collateral estoppel. *See In re Pickle*, 1998 WL 413023, at *2 (5th Cir. June 12, 1998); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1103 (5th Cir. 1981); *see also Avondale Shipyards*, 786 F.2d at 1269 (adhering to the Fifth Circuit's "previously stated rule that an order granting partial summary judgment 'has no res judicata or collateral estoppel effect'" (quoting *Golman v. Tesoro Drilling Corp.*, 700 F.2d 249, 253 (5th Cir. 1983)).

And even if Dr. Tudor's proposed claim would survive a motion to dismiss, her motion would still fail because that claim raises no issue of law or fact that is common to this case. The Fifth Circuit has summarized the law of collateral estoppel as follows:

> Issue preclusion, or collateral estoppel, . . . promotes the interests of judicial economy by treating specific issues of fact or law that are validly and necessarily determined between two parties as final and conclusive. Issue preclusion is appropriate only if the following four conditions are met. First, the issue under consideration in a subsequent action must be identical to the issue litigated in a prior action. Second, the issue must have been fully and vigorously litigated in the prior action. Third, the issue must have been necessary to support the judgment in the prior case. Fourth, there must

> be no special circumstance that would render preclusion inappropriate or unfair. If these conditions are satisfied, issue preclusion prohibits a party from seeking another determination of the litigated issue in the subsequent action.

United States v. Shanbaum, 10 F.3d 305, 311 (5th Cir. 1994); *accord State Farm Mut. Auto. Ins. Co. v. LogistiCare Solutions, LLC*, 751 F.3d 684, 689 (5th Cir. 2014); *Gandy Nursery, Inc. v. United States*, 318 F.3d 631, 638 (5th Cir. 2003). To win her proposed claim, Dr. Tudor would have to establish that the opinion issued by the *Tudor* court met the conditions for issue preclusion. To do so, she would be arguing about the form and effect of the *Tudor* court's opinion, and not about the merits of its analysis. Nothing that Dr. Tudor would need to prove in litigating a claim for collateral estoppel is currently at stake in this case: no issue of law, and no issue of fact. There is no question here of whether the issue litigated in Dr. Tudor's case—whether her claim of sex discrimination is cognizable under Title VII—was "fully and vigorously litigated" there. There is no question raised here of whether the *Tudor* court's resolution of that issue was "necessary to support the judgment" (which, as discussed above, has not issued) there. And this Court will not take up the question of whether any "special circumstance . . . would render preclusion inappropriate or unfair." Dr. Tudor propopes to raise an entirely distinct claim, with no legal or factual overlap with the claims asserted here.[3] That is inconsistent with Rule 24(b).

Permissive intervention is only allowed when "the factors which render permissive intervention appropriate under Federal Rule of Civil Procedure 24(b) [a]re present." *Korioth v. Brisco*, 523 F.2d 1271, 1278 (5th Cir. 1975); *see also* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1911 (3d ed. 2007) (explaining that, in Rule

[3] In adjudicating whether Dr. Tudor suffered discrimination in Oklahoma, on the particular facts adduced in the Oklahoma litigation, the United States and Dr. Tudor have aligning interests. That claim and those facts are not at issue here.

24(b)(1)(B), "a common question of law or fact . . . is stated as a limitation on intervention"). Because Dr. Tudor's proposed Declaratory Judgment Act claim has no issue of law or fact in common with this case, she is not eligible for permissive intervention and her motion must be denied.

To be clear, Defendants' arguments against Dr. Tudor's intervention do not in any way undermine the government's concerns about the potential scope of this Court's Preliminary Injunction, which have already been briefed and argued at length. If this Court were to rule that its Preliminary Injunction barred the United States from proceeding in Dr. Tudor's case—which, for the reasons explained above and elsewhere, it should not—she would certainly be affected (and significant comity and separation of powers concerns would be implicated). Indeed, she has already been impacted by the *Tudor* court's decision to stay all deadlines until this Court clarifies its Preliminary Injunction. Dr. Tudor has a legitimate stake in certain elements of the pending clarification motion, but she has not at this point proposed a valid independent claim and her intervention would not aid this Court in resolving the questions before it.

CONCLUSION

For the reasons stated above, this Court should deny Dr. Rachel Tudor's motion to intervene in this case.

Dated: October 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, a copy of the foregoing Opposition to Dr. Rachel Tudor's Motion to Intervene was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
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