IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DR. RACHEL TUDOR, Plaintiff, v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	)	Case No. 5:15-CV-00324-C

PLAINTIFF DR. RACHEL TUDOR'S
MOTION AND INCORPORATED BRIEF
SEEKING RECONSDIERATION OF FRONT PAY

Dr. Tudor respectfully requests that the Court reconsider the front pay order (ECF No. 286) so as to correct or clarify the period for which front pay is awarded, otherwise correct a mathematical error in computation, and reconcile or reconsider conflicts between the order and the earlier issued reinstatement order (ECF No. 275).

I. PERIOD OF FRONT PAY AWARD

The front pay order grants front pay for a period of 14-months, measured by the time between Tudor's termination from Southeastern in May 2011 and the start of her job at Collin College in September 2012 (ECF

No. 286 at 4). However, that particular calendar period cannot be remedied with front pay.

Though Tudor did in fact lose compensation between the time of the adverse actions and trial (failure to promote in the 2009-10 tenure cycle *and* termination in May 2011), those losses are redressed with *back pay*, not *front pay*. *See Dalal v. Alliant Techsystems, Inc.*, 1995 WL 747442, at *3 (10th Cir. 1995) ("[F]ront pay is an alternative to the remedy of reinstatement, and thus it is an award of future damages. Compensation for the period prior to trial constitutes back pay, a matter that was already submitted to the jury and that cannot be awarded again by the court as front pay.").

Similar to the situation in *Dalal*, Dr. Tudor sought back pay from the jury, presented evidence in support thereof, and the jury was instructed to compute the appropriate compensation to her as back pay.[1] Tudor understands that the jury appropriately awarded undifferentiated back pay, subsumed in the omnibus damages award. *See* ECF No. 262 at 2 (awarding Tudor combined total damages of $1,165,000 without delineating kind). Dr. Tudor respects the jury's verdict and does not seek additional back pay.

[1] *See, e.g.*, Jury Instructions, ECF No. 257 at 24 (Types of Damages—Instruction No. 14: "Back pay damages are to compensate Plaintiff for the economic injuries or losses she sustained as a result of Defendants' illegal discrimination or retaliation."); *id.* at 26 (Back Pay Damages—Instruction No. 15: "You may consider the earnings to which Plaintiff proves she would have been entitled if her employment had not ended, measured from the time her employment with Defendants ended in May of 2011, until she began employment with Collin College in September of 2012. These damages are intended to put Plaintiff in the economic position she would have been [in] if her employment with Defendants had not ended.").

II. ERROR IN COMPUTATION OF FRONT PAY

In the event that the Court intended to award front pay for the 14-month period immediately *after* the trial, Dr. Tudor respectfully points out a mathematical error.

The front pay order indicates (ECF No. 286 at 4–5) that Tudor is entitled to 14-months of front pay which shall be calculated based upon the yearly salary identified in Scenario 4 of the exhibit computing front pay (ECF No. 279-8 at 6). However, the $51,463.52 figure, which the front pay order identifies as Tudor's "yearly compensation" (ECF No. 286 at 5), is actually the pro-rated projected 2017-18 term salary over a 253-day period between the jury verdict (November 20, 2017) and the end of the 2018 Summer session (July 31, 2018), not annual salary. *See* ECF 279-8 at 6 (Scenario 4 at line one, column marked "Period" reflecting date range of "11/20/17–7/31/18").

Assuming the Court intended to award Tudor 14-months of front pay at the rate indicated in Scenario 4, the proper sum is $90,080.58. This sum is arrived at by taking the pro-rated 2017-18 compensation ($51,463.52) and adding to it pro-rated 2018-19 compensation[2] ($38,617.06[3]). Under this

[2] Because it is undisputed under Southeastern's salary card (ECF No. 286 at 3) that Tudor is entitled to a slightly higher rate of pay each succeeding year of service, and a 14-month front pay period falls across two different service years, using a pro-rated portion of the 2017-18 salary card rate and the 2018-19 rate is the proper means of computing a 14-month period of front pay immediately following trial.

[3] To calculate the pro-rated salary for the 2018-19 term, one takes the total year compensation of $81,475.16, divides it by 365 to reduce it to a daily rate ($223.22), and then

calculation, Tudor is compensated for 253 days under the appropriate rate for the 2017-18 term (Nov. 20, 2017 through July 31, 2018) and 173 days under the rate for the 2018-19 term (August 1, 2018 through January 20, 2019).

III. OTHER ISSUES

A. Revisiting Front Pay

In the event that the Court did not intend to award front pay for the period *after* trial, Dr. Tudor respectfully requests the Court reassess whether front pay is necessary to make Tudor whole. In support thereof, Dr. Tudor points to the trial proceedings as well as her arguments and evidence in her merits brief (ECF No. 279), reply brief (ECF No. 285), and motions to supplement (ECF Nos. 280 and 282[4]). In addition, Dr. Tudor respectfully clarifies other issues.

Dr. Tudor's subsequent reemployment at Collin College does not bar front pay. *Contra* ECF No. 286 at 4 ("Because Plaintiff gained similar employment at Collin County, any front pay which Plaintiff is entitled must end with the beginning of her employment there."). The mere fact that Tudor found subsequent, temporary, non-equivalent employment in the same

multiplies the daily rate by 173 (the number of days between the end of the 2017-18 term and January 20, 2019, the day that falls 14 months after the jury verdict).

[4] The undersigned erroneously filed ECF No. 281 (which contained an error) and refiled a corrected version as ECF No. 282. Given the foregoing, the Court properly struck ECF No. 281 as moot in the front pay order (ECF No. 286 at 5).

sector[5] at Collin College does not bar front pay. *See, e.g.*, *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1146 (10th Cir. 2006) (front pay available where there is evidence that employee has "no prospects of attaining" similar pay to that entitled if reinstated at old job even if she is reemployed in same sector); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 382–83 (1st Cir. 2004) (separation from mitigation job, even where employee is at fault for separation, does not bar lost wages from first employer) (*citing Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999)).

Unrefuted evidence shows that Dr. Tudor did not earn more at Collin College than she would have if reinstated at Southeastern. *Contra* ECF No. 286 at 3 ("Her pay at that college exceeded what she had made at Southeastern."). The record reflects that Dr. Tudor's, year-to-year earnings at Collin College were significantly less than what she would make if reinstated at Southeastern.[6]

Dr. Tudor need not prove Defendants' Title VII violations are the proximate cause of her separation from Collin College. *Contra* ECF No. 286 at 3 ("There is no suggestion or any evidence from which the Court could

[5] Uncontroverted evidence in the record shows that the Collin College job did not offer the security of tenure (Tudor Dec., ECF No. 279-3 at 7 n.1), it offered lower benefits than Southeastern (*id.*), it had substantially different job responsibilities than teaching at a four-year university (*id.*), and it is substantially less prestigious than teaching at a four-year university (*id.*).

[6] *Compare* ECF No. 270-6 at 6 (Defendants' evidence of Tudor's highest rate of compensation at Collin College, showing annual compensation of $58,022 in the 2014-15 term) *with* ECF No. 279-8 (showing Tudor's projected Southeastern compensation for 2017-18 term, once pro-rate adjustment is removed, as higher under scenario 1 [$82,862.72], scenario 2 [$74,245.79], scenario 3 [$82,862.72], scenario 4 [$74,245.79]).

determine that the discrimination at Southeastern, as found by the jury, ultimately led to or even played a role in Collin College's determination to terminate Plaintiff.").

"The award of future wages is designed to compensate the plaintiff for any economic loss from the date of the trial until a date certain in the future when such loss is extinguished." *Wirtz v. Kan. Farm Bureau Servs., Inc.*, 274 F.Supp.2d 1215, 1221 (D.Kan. 2003). To support a front pay award, Tudor need only prove that, without it, she will be economically harmed by Defendants' past illicit actions into the future because she will lose out on income. *Carter v. Sedgwick Cnty., Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991) ("front pay should be limited to the amount required to compensate a victim for the continuing future effects of discrimination until the victim can be made whole").

Tudor need not prove that Defendants directly caused the loss of her mitigation employment to get front pay. *See, e.g.*, *Johnson*, 364 F.3d at 382–83. The purpose of front pay, where reinstatement is denied, is to make the employee economically whole for loss of future work that, but for discrimination, she was entitled. *See, e.g.*, *Cox v. Shelby State Comm. Coll.*, 194 Fed.Appx. 267, 276–77 (6th Cir. 2006) (approving front pay award through remaining work life expectancy of professor who was not reinstated in light of evidence that he could not secure equivalent employment and

would, without front pay, suffer economic loss). "If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1173 (10th Cir. 1985).

Front pay period should give Tudor time to make up difference in lost income. Whatever period of front pay is awarded, it should track the time, based on evidence in the record, the Court deems necessary for Tudor to be made economically whole in terms of future wages. The Court's inquiry should look at what Tudor would be paid if reinstated (see ECF No. 279-8 [computing earnings]), her current earning capacity, and her actual job prospects. *See Carter v. Sedgwick Cnt., Kan.*, 36 F.3d 952, 957 (10th Cir. 1994) (front pay award that does not "make whole" based on evidence in record is reversible "guesswork"); *Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999) (rejecting flat two-year front pay period where "record does not appear to support" conclusion that employees are made whole).

Tudor stands by her proffer that, because her job prospects are so dim, it is appropriate to grant her front pay for a period between present and her retirement at age 75. *See* ECF No. 279 at 6–16 (argument and evidence in support). It is undisputed that Dr. Tudor has been unemployed since her separation from Collin College in May 2016, two years ago. All evidence

reflects that at present, Tudor has no prospect of obtaining *equivalent* employment to the tenured job she earned at Southeastern. There is no evidence showing Tudor failed to mitigate damages. Indeed, the record reflects that Tudor has diligently sought out work, attempted to improve her marketability (ECF No. 279-3 ¶ 3(d) [Tudor attesting to recent efforts]), and even resorted to directly confronting the specter of the Southeastern tenure denial head-on in cover letters to prospective employers sent after the jury's verdict (*Id.* ¶ 3(c)). Despite continuous diligent efforts,[7] the undersigned attests that Tudor still has not received a single offer of employment since her separation from Collin College.

B. Necessity of reconciling reinstatement and front pay orders.

The front pay order (ECF No. 286 at 4) construes the Collin College materials as something other than after-acquired evidence. *See* ECF No. 286 at 4 ("It is not after-acquired evidence, it is evidence of Plaintiff's mitigation of damages and evidence related to her employability following her separation from Southeastern."). But that holding is in tension with the reinstatement order, which treats the Collin materials as after-acquired evidence barring reinstatement (ECF No. 275 at 3–4).

[7] *See* **Exhibit 1** (collecting sampling of application submissions and denials and between close of discovery and present, none of which have resulted in a job offer; also collecting sampling of Tudor correspondence with Southeastern recommenders Dr. Dan Althoff and Dr. John Mischo during same period). Given the foregoing, substantial front pay should be awarded. *Cox*, 194 Fed.Appx. at 276–77 (approving substantial front pay for a non-reinstated professor where reinstatement denied).

The reinstatement order makes crystal clear that Defendants sought to use and the order treated the Collin materials as after-acquired evidence and, on that basis, reinstatement was denied. As with any other after-acquired evidence proffer, Defendants pointed to the Collin materials (see, e.g., ECF No. 270 at 16–17), which are evidence of Tudor's post-termination activities.[8] Defendants then claimed the Collin materials reveal a deficiency concerning Tudor's current qualifications to teach at Southeastern (*id.*). Defendants threaded the after-acquired evidence needle by arguing that, based on the Collin materials, Tudor should never have been given tenure at Southeastern in the first place because they purportedly prove Tudor did not meet their old qualifications[9] (*id.* at 18–19) and thus she should not be reinstated.

The undergirding logic of Defendants' reliance on the Collin materials to oppose Tudor's reinstatement is that if Defendants would not, based on what they now know of Tudor's post-termination activities at Collin College, give her tenure today, reinstatement is futile and should be denied. The reinstatement order relied on Defendants' proffer. *See* ECF No. 275 at 3

[8] The Tenth Circuit recognizes that an employer's invocation of an employee's post-termination conduct, supposedly showing non-illicit grounds to terminate today, when cited to resist reinstatement, is a form of after-acquired evidence. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999); *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1205–06 (10th Cir. 2015).

[9] This move is critical because reinstatement cannot, absent after-acquired evidence, be denied on the premise that the employee does not meet the employer's current qualifications for the job wrongfully denied. *See Blangsted v. Snowmass-Wildcat Fire Protection Dist.*, 642 F.Supp.2d 1250, 1266–67 (D.Colo. 2009) (cannot deny reinstatement on premise that employer's new qualifications not required at time of adverse action would preclude hire of wronged employee today; reinstatement should place wronged employee in same position she was in but for violation).

("Defendants have offered substantial competent evidence demonstrating that they are convinced that Plaintiff's teaching abilities and academic pursuits do not rise to the level which would warrant a tenured professorship at Southeastern."). And, based on that proffer, reinstatement was denied. *Id.* at 4. Construal of post-termination evidence in this manner is, by definition, treating the Collin materials as after-acquired evidence.[10]

The problem with Defendants' invocation of the Collin materials at reinstatement is cast in stark relief by the front pay order, which recognizes "Defendants stipulated they would not rely on after-acquired evidence" (ECF No. 286 at 4). For the reinstatement denial to be sustained based on the Collin materials, there must be some "other purpose" for which they may be used. But there is none.

As the front pay order recognizes, the only "other purposes" of the Collin materials are to evidence Tudor's employability or mitigation (ECF No. 286 at 4). But neither is relevant to reinstatement. For obvious reasons, Tudor's prospects of employment elsewhere have no relevance to whether she has a right return to Southeastern. And, it is well-settled that evidence of mitigation efforts is irrelevant to reinstatement. *Dilley v. SuperValue, Inc.*,

[10] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361 (1995) (after-acquired allows "account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing"); *id.* at 362 (after-acquired evidence narrowly permitted after liability is proven at the remedial stage, reasoning that "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.").

296 F.3d 958, 967–68 (10th Cir. 2002) (failure to mitigate defense not applicable to reinstatement demand).

The Collin materials were treated as after-acquired evidence in the reinstatement order (ECF No. 275), but they should not have been considered because they cannot be used as such (ECF No. 286 at 3) and, for that reason, the decision to deny reinstatement should be reconsidered.

C. Irreconcilable holdings work an injustice.

As a matter of logic, Tudor cannot both be unqualified to be a tenured professor at Southeastern and simultaneously qualified for an equivalent tenured professorship elsewhere. Yet, the reinstatement order denies Tudor reinstatement on the finding that she is currently *unqualified* for a Southeastern professorship (ECF No. 275 at 4–5). And the front pay order finds Tudor should not get substantial front pay because she is *qualified* to obtain an equivalent life tenure professorship elsewhere. *See* ECF No. 286 at 3 (rejecting Tudor's proffer that she cannot obtain comparable employment absent reinstatement). The holdings of these two orders are irreconcilable. Tudor is either qualified to be a tenured professor—as the jury so implicitly found—or not.

The reinstatement and front pay orders also work an injustice. As a matter of equity, Tudor should be given the relief necessary to be made whole based on what the record shows is necessary to close the gap between the life

earning trajectory she would have been on but for Defendants' illicit actions and the trajectory she has been relegated to because of the Title VII violations. Denying Tudor both reinstatement and substantial front pay falls short of the making Tudor whole.

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully requests that the Court reconsider the front pay order (ECF No. 286) in light of the issues presented above and otherwise reconcile the findings made therein with the earlier issued order denying reinstatement (ECF No. 275).

Dated: May 2, 2018

/s/ Ezra Young
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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)