CASE NO. 15-cv-324-C

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

RACHEL TUDOR,

Plaintiff,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendants.

DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND, IN THE ALTERNATIVE, FOR NEW TRIAL

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DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

Plaintiff failed to put forth sufficient factual evidence to sustain the jury verdicts here. Most prominently, Plaintiff put on a transgender identity case, which is not encompassed by Title VII under Tenth Circuit precedent, rather than a sex-stereotyping case. As such, Defendants renew their motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. In the alternative, Defendants move under Rule 59 for a new trial because: (1) Plaintiff's evidence was insufficient and tainted by religious bigotry; (2) Plaintiff's expert should not have been allowed to testify, as was made apparent by his unfounded and subjective trial testimony; and (3) even with the Title VII statutory cap applied, Plaintiff's award was wrongly based on emotional distress and otherwise unsupported by the evidence.

I. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A federal district court may consider a motion for judgment as a matter of law on an issue at any time before a case is submitted to a jury. Fed. R. Civ. P. 50(a). Such

a motion "must specify the judgment sought and the law and facts that entitle the movant to the judgment." *Id.* Judgment as a matter of law is appropriate where "the evidence points one way and is not susceptible to reasonable, contrary inferences supporting the non-movant." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1255 (10th Cir. 2017); *see also* Fed. R. Civ. P. 50(a) (court may grant judgment if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). After trial, and no later than 28 days after judgment has been entered, a court may consider a renewed motion for judgment as a matter of law. Fed. R. Civ. P. 50(b). "Arguments presented in a Rule 50(b) motion cannot be considered if not initially asserted in a Rule 50(a) motion." *Perez,* 847 F.3d at 1255.

During trial, Defendants move d for judgment as a matter of law on all four of Plaintiff's Title VII claims—which consist of two discrimination claims, a hostile work environment claim, and a retaliation claim—arguing that each was unsupported by sufficient evidence to be submitted to a jury. The Court denied Defendants' motion. With the hostile work environment claim having been resolved in Defendants' favor, Defendants now renew their motion on the retaliation and discrimination claims only.

No direct evidence of discrimination or retaliation has been produced, thus the U.S. Supreme Court's *McDonnell Douglas* framework applies, through which this Court must "evaluate whether circumstantial evidence of discrimination presents a triable issue." *Fassbender v. Correct Care Solutions, LLC*, 890 F.3d 875, 884 (10th Cir. 2018). This well-known framework requires Plaintiff first to establish a *prima facie* case of discrimination. *Id.* If accomplished, the burden of production shifts to

Defendants to articulate legitimate, non-discriminatory reasons for their actions. *Id.* When Defendants do so, the burden shifts to Plaintiff to "show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Id.* (quoting *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005)). In the end, Plaintiff "bears the ultimate burden of persuasion to show discrimination." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017).

A. Plaintiff produced insufficient evidence that Defendants discriminated in denying Plaintiff tenure in 2009-10.

1. Plaintiff forsook a prima facie case by relying on transgender identity

To make a *prima facie* case of discrimination or retaliation, Plaintiff must demonstrate membership in a protected class. *See Fassbender*, 890 F.3d 875 at 885. Before trial, Defendants filed both a motion to dismiss and a motion for summary judgment arguing that this case should be disposed of because it was improperly relying on Plaintiff's transgender identity, which is not a protected class under Title VII. [Docs. 30 and 177]; *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]ranssexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual."). The Court denied both of those motions on the ground that Plaintiff was *not*, according to the Court, "complaining that transgender persons were treated different," but rather was contending "that Dr. Tudor, once she was a woman, was treated differently." Trial Transcript Vol. I, p. 8; *see also Etsitty*, 502 F.3d 1215 (distinguishing an impermissible transgender identity claim from a sex-stereotyping claim).

At trial, however, Plaintiff repeatedly abandoned this posture and painted the proceedings for the jury as being about transgender identity, as well as about bathrooms, religious objections, and pronouns, etc.—all of which have little to do with sex stereotyping and everything to do with the current cultural controversies on transgenderism. (The bathroom issue, in particular, was explicitly *foreclosed* by *Etsitty* as being part of a sex-stereotype claim.[1]) Here are just a select few of the most egregious examples, from various stages of trial:

- *Opening Statements*:
    - Plaintiff's attorney: "My client … is transgender. That fact right there is why we're all here today." Trial Transcript Vol. 1, p. 17.
    - Plaintiff's attorney: "Doug McMillan wanted Rachel gone because she's transgender." *Id.* at 20.
    - Plaintiff's attorney: Defendants are "counting on you to not like transgender people." *Id.* at 27.
- *Plaintiff Testimony*:
    - Plaintiff's attorney: "Now, Rachel, we're obviously all here today because you went through a gender transition." *Id.* at 40.
    - Plaintiff: Cathy Conway "told me that Doug McMillan, when he discovered that I'm transgender, that he wanted to summarily fire me." *Id.* at 42.
- *Cotter-Lynch Testimony*:
    - Plaintiff's attorney: "Today, [Cotter-Lynch,] would you recommend Southeastern as a good place for transgender students to attend? …

[1] The entire *Etsitty* case revolved around bathrooms: "However far *Price Waterhouse* reaches," the *Etsitty* panel wrote, referencing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), "this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Id.* at 1224.

> [W]ould you recommend that transgender professors apply for positions at Southeastern?" Trial Transcript Vol. 2, pp. 351-52.

- *Scoufos Testimony*:
  - Plaintiff's attorney: "So you right away, right out the gate, started classifying Dr. Tudor's portfolio in the transgender stack, is that correct?" Trial Transcript Vol. 4, p. 604.
  - Plaintiff's attorney: "And you understand that the allegations of discrimination is that – it's because Dr. Tudor's transgender; correct? You understand that?" *Id.* at 623-24.
- *McMillan Testimony*:
  - Plaintiff's attorney: "Do you recall, when your deposition was taken, that you indicated you didn't know which restroom transgender people should use?" *Id.* at 698.
- *Closing Argument*:
  - Plaintiff's attorney: "[I]f Rachel Tudor were not a transgender woman, we would not all be here today." Trial Transcript Vol. 5, p. 828.
  - Plaintiff's attorney: "Professors who are transgender women are still scared to apply there, to go there. Things can't ever be right down at Southeastern if Rachel Tudor doesn't get justice." *Id.* at 833-34.
  - Plaintiff's attorney: "Conway projected her own animus of transgender women onto other folks at Southeastern." *Id.* at 840.

It is difficult to look at all of these statements, accompanying testimony, and the record as a whole, and not conclude that Plaintiff put on a transgender identity case. Whether or not one agrees with the current state of the law, this is impermissible under Title VII. If allowed to stand, this case would make a mockery of the *Etsitty* distinction; indeed, it is hard to imagine, with this verdict as precedent, how anyone could ever be barred from putting on a transgender identity case by *Etsitty*, even though the decision plainly said transgender identity is not included in

Title VII and in fact kept the plaintiff in that case from bringing such a claim. In other words, if not corrected, this case would be a radical expansion of *Etsitty*, and the Tenth Circuit has explicitly stated its "reluctance to expand the traditional definition of sex in the Title VII context." *Etsitty*, 502 F.3d at 1222.

The Court gave Plaintiff every chance to put on a sex-stereotyping case that complied with *Etsitty*, and Plaintiff repeatedly refused to do so. In *Etsitty*, the Tenth Circuit stated that "an individual's status as a transsexual should be *irrelevant* to the availability of Title VII protection." *Id.* (emphasis added). But rather than treat Plaintiff's transgender identity as irrelevant, Plaintiff made it the centerpiece of trial. This is out of line with Title VII, it nullifies Plaintiff's attempt at making a *prima facie* case, and the Court should grant judgment to Defendants. *See id.* at 1220-21 (Title VII "should not be treated as a 'general civility code' and should be 'directed only at discrimination because of sex.'"); *id.* at 1222 n.2 ("If transsexuals are to receive legal protection apart from their status as male or female … such protection must come from Congress and not the courts.").[2]

[2] This is all assuming, of course, that the Court is indeed correct that Plaintiff—a biological male—could legitimately claim to be a member of the protected class of women under Title VII, as the Court held in its motion to dismiss and summary judgment orders. *See* [Doc. 34, at 5]. Although Defendants grant this foundational point for purposes of the above argument, they still contest it as a matter of law.

To allow such a claim, the Court's earlier order misreads *Etsitty* and its footnote 2 citation of *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Most tellingly, the Tenth Circuit in that very same footnote favorably quoted the Seventh Circuit for the proposition that if "the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, *the new definition must come from Congress*." *Etsitty*, 502 F.3d at 1222 (emphasis added) (quoting *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984)). This is the official position of the United States

2. Plaintiff did not make a prima facie case that Plaintiff was qualified

To make a *prima facie* case that Defendants unlawfully discriminated when not awarding tenure during the 2009-10 school year, it must be demonstrated—by Plaintiff, by a preponderance of the evidence—that Plaintiff was truly qualified for the position being sought at the specific time in question. *See DePaula*, 859 F.3d at 969–70. This means Plaintiff must introduce "credible evidence" of meeting Defendants' "objective requirements necessary to perform the job." *Kilcrease v. Domenico Transportation Co.*, 828 F.3d 1214, 1220–21 (10th Cir. 2016).

Here, Plaintiff failed to do so. It is undisputed that Plaintiff was unable to produce the actual tenure portfolio submitted in 2009. Plaintiff's most favorable witnesses openly acknowledged this absence. Robert Parker, for example, admitted the portfolio he was given to analyze as an expert was "partial" and incomplete. Trial Transcript Vol. 2, p. 229. Meg Cotter-Lynch admitted she never reviewed the 2009 portfolio at all nor saw a complete copy of it. *Id.* at 358-59. And so on. Without the original portfolio, it is nearly impossible to know the extent of Plaintiff's qualifications (or lack thereof) as they appeared to Defendants in 2009-10. Thus, it can hardly be

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government, as well. *See* Brief for United States as Amicus Curiae at 4, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (No. 15-3775), 2017 WL 3277292 ("[T]he word 'sex' means biologically male or female." (citation omitted)). And, importantly, it does not contradict *Smith*. There, Smith was a biological male who the Sixth Circuit ruled could bring a claim *as a male* who faced discrimination because of his increasingly feminine behavior. *See Smith*, 378 F.3d at 570 ("Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder" who was treated differently "on account of his non-masculine behavior and GID."). Plaintiff did not bring this claim as a biological man, and thus did not fall within Title VII's strictures.

said Plaintiff has produced substantial evidence, much less a preponderance of the evidence, of meeting Defendants' basic requirements for a tenured professorship.

Several factors from trial further cement this reality. First, Plaintiff could have theoretically attempted to address this glaring deficiency on the stand, and yet did not do so. That is to say, Plaintiff made little effort to testify comprehensively as to the precise contents of the 2009 portfolio. A *prima facie* case was Plaintiff's burden to meet, by a preponderance of the evidence, and Plaintiff chose to ignore a gaping hole in the case. Second, Plaintiff's failure to preserve the critical portfolio was made even worse by Cotter-Lynch's admission that she preserved her own tenure portfolio from 2008. *See* Trial Transcript Vol. 2, p. 314 ("I've, to this day, kept it in my home."). If Cotter-Lynch could preserve her portfolio, why could Plaintiff not? Plaintiff never enlightened us as to the reason for her spoliation. Third, Parker testified that it is improper for a university to consider documents that are *not* in a portfolio when making a tenure decision because doing so would "open the door to bias, to misinformation, to personal whim, to all sorts of inappropriate things." *Id.* at 240. In other words, Plaintiff's own expert—the sole expert in the case—emphasized that the portfolio *is all that matters* for tenure qualification. Yet despite this, and despite Plaintiff bearing the burden of production, we still do not know precisely what was in Plaintiff's portfolio in question, how it was arranged, or how it was presented. Fourth, there was uncontested testimony from at least one other witness in the case that the contents of the trial portfolio were in question. Specifically, Lucretia Scoufos testified that she believed original documents were missing from the portfolio shown at trial,

and she testified that there were documents in the trial version that were *not* in the original portfolio. Trial Transcript Vol. 4, pp. 583-84. This testimony went unrebutted. For all these reasons, judgment should be entered in favor of Defendants.

Even if Plaintiff had produced the 2009 portfolio, it still would not be enough to establish a *prima facie* case. That is because there was undisputed testimony—from Plaintiff's own witnesses—that: (1) one of Defendants' objective qualifications for tenure was that candidates have multiple peer-reviewed publications; and (2) Plaintiff did not have multiple peer-reviewed publications in 2009.

As to the first point, Plaintiff testified that a tenure candidate must publish "articles"—plural—"to demonstrate good scholarship." Trial Transcript Vol. 1, p. 51. John Mischo, who testified for Plaintiff, agreed that more than one peer-reviewed publication was necessary: "Typically, I would say you would need one and a half publications." Trial Transcript Vol. 3, p. 418. Another of Plaintiff's witnesses, Mark Spencer, testified that it became "clear" to him during his tenure process three years earlier that multiple peer-reviewed articles were needed. *Id.* at 452. And, significantly, Spencer testified that he told this directly to Plaintiff: "[T]he advice I gave was immediately after my experience in 2006-2007 … [I advised Plaintiff that] I wouldn't go up for tenure without two articles." *Id.* at 451.

Spencer, for obvious reasons, was "surprised" that Plaintiff failed to take his advice. *Id.* at 452. Plaintiff's 2009 application, he testified, "wasn't a strong application because there was just the one article." *Id.* at 443. (Remember, Spencer was *Plaintiff's* witness.) And although Mischo (also Plaintiff's witness) could not

remember on the stand how many articles Plaintiff's original portfolio contained, he acknowledged that his contemporaneous evaluation mentioned a "Published article"—singular—and nothing more. *Id.* at 402, 421. Furthermore, Mischo testified that if Tudor only submitted one article at the time, it would not meet his criteria of "one and a half publications," and he admitted that he had advised Plaintiff at one point that Plaintiff was not doing enough in the areas of research and scholarship to qualify for tenure. *Id.* at 421-23. Finally, Department Chair, Randy Prus—another one of Plaintiff's witnesses—testified that Plaintiff "had one" publication in the 2009 application. *Id.* at 466.

These are Plaintiff's words and Plaintiff's own witnesses, testifying together that Plaintiff's 2009 tenure portfolio failed to meet Defendants' objective standard for tenure.[3] Defendants' witnesses back this up. *See, e.g.,* Trial Transcript Vol. 4, p. 581 (Scoufos: "She had only one publication [in 2009] and – by a peer review, and so her scholarship was lacking."). Regardless of what Defendants' witnesses have to say, however, Plaintiff own case-in-chief clearly failed to produce a preponderance of the evidence indicating that Plaintiff's 2009 portfolio met this basic qualification for tenure.

[3] To be sure, Parker's expert report was based around the idea that Plaintiff had two published, peer-reviewed articles. This has no relevance, however, given that Parker did not claim any foundation on which he could know how many articles were in the original portfolio; to the contrary, he openly admitted the version he was given years later was not the original. In short, Parker's report was erroneous on this point.

3. Plaintiff failed to provide sufficient evidence of pretext

Even assuming Plaintiff somehow made a prima facie case without producing the 2009 portfolio, Defendants clearly put forth legitimate, non-discriminatory reasons for the denial of tenure: a lack of scholarship and service. *See, e.g.*, Trial Transcript Vol. 4, pp. 581-82, 591 (Scoufos testimony); *see also DePaula*, 859 F.3d at 970 ("The defendant's burden is 'exceedingly light,' as its stated reasons need only be legitimate and non-discriminatory 'on their face.'" (citations omitted)). Thus, the burden would return to Plaintiff to provide legitimate evidence that Defendants' articulated reasons were pretextual. *See id*. Plaintiff may do so by attacking Defendants' proffered reasons or by providing evidence that unlawful discrimination was a primary factor in the decision. *Id.* Here, taking a bit of a sawed-off shotgun approach, Plaintiff has attempted both in various ways, and failed.

We will start with accusations of unlawful discrimination. During trial, it was repeatedly emphasized that Plaintiff faced hostility due to the 2007 gender transition. There are several problems with viewing this as sufficient to establish pretext, however. First, the jury declined to find a hostile work environment. Second, as was discussed thoroughly above, the vast majority of the evidence presented went to transgender identity—which is not protected under Title VII—rather than to any kind of a sex-stereotyping claim. Third, the only testimony that could even arguably be construed as pertaining to sex stereotyping was provided by Mindy House, and it concerned Dean Scoufos only. *See* Trial Transcript Vol. 3, pp. 520-21 (House: Scoufos criticized Plaintiff's clothing and other efforts to appear feminine and mocked

Plaintiff's voice). But even if we accept House's testimony as true, "isolated and tangential comments about [Plaintiff's] appearance are insufficient to alone permit an inference of pretext." *Etsitty*, 502 F.3d at 1226. And regardless, it is undisputed that Scoufos was not the decision maker here, or even second-in-command. *See, e.g.*, Trial Transcript Vol. 4, p. 690 (McMillan: Plaintiff "wasn't turned down at that level [by Scoufos]. … [I]t was a recommendation. … [A]ll levels of the review process are independent of one another."); Trial Transcript Vol. 5, pp. 788-89 (former President Jesse Snowden: A tenure application "goes through all levels. And it can be changed at any succeeding level going up. For example, if the dean—and this happened to me as dean a couple of times—did not recommend promotion and tenure, the vice president could recommend it or the president could. … It's important to state that these are only recommendations until it gets to the president."). Indeed, Plaintiff admitted that each level of review "has an *independent* obligation … to thoroughly review the portfolio and determine if it is sufficient for tenure." Trial Transcript Vol. 1, p. 187 (emphasis added).

President Larry Minks was the ultimate decision maker here, and there was zero evidence presented of sex stereotyping on his part. Moreover, even if Dr. McMillan was the force behind the tenure denial, as Plaintiff asserted,[4] House did

[4] During closing, Plaintiff's attorney claimed that "All of this, it all went back to Doug McMillan" and that "McMillan pulled the puppet strings to push Rachel out of that university." Trial Transcript Vol. 5, pp. 837, 841. The only mention of Scoufos was to use her as a battering ram against McMillan: "Scoufos told you it was all Doug McMillan's fault." *Id.* at 840. Wholly absent was any mention of the actual final decision maker, Dr. Larry Minks, and his recommendation to the Board of Regents.

not testify to sex-stereotyping on his part, either. Indeed, she explicitly declined to accuse him of the same statements and actions as she did Scoufos. *See* Trial Transcript Vol. 3, p. 522 (House: I never heard Doug McMillan make fun of Dr. Tudor.). Thus, one of Plaintiff's biggest hooks for pretext—House's testimony—is gone.

Plaintiff also attempts to undermine Defendants' non-discriminatory reasons by repeatedly asserting that Defendants failed to provide an explanation for negative recommendations during the tenure evaluation process. This, according to Plaintiff, could have allowed improvements to the application. Plaintiff produced no evidence, however, that any explanation was required *before* the end of the process. Rather, the Academic Policies and Procedures Manual provision Plaintiff points to (Policy 3.7.4) states that the governing board and president should provide in detail their compelling reasons in the rare instance that they disagree with a faculty judgment on faculty status such as tenure. This policy requires nothing of a dean or a vice president, rendering irrelevant Plaintiff's red-herring complaint that "I never received an explanation from Lucretia Scoufos or Doug McMillan for their reasons for denying me tenure [in 2009]." Trial Transcript Vol. 1, p. 71. Moreover, to the extent the policy requires an explanation,[5] it can only apply *after* a president has actually made the decision to grant or deny tenure—meaning, logically, that a reason does *not*

[5] Several witnesses denied that the policy required any explanation at all—before or after the decision. For purposes of judgment as a matter of law, this brief assumes that these witnesses were incorrect.

have to be given during the process. Thus, this entire line of argument does little to demonstrate pretext.

Nevertheless, Plaintiff points to Spencer in an attempt to bolster the assertion that an earlier explanation would have allowed for improvements. Spencer testified that, during his evaluation, he was able to proactively track down the dean, vice president, and president to discuss his portfolio, and that their advice helped him to fix flaws in his application. Trial Transcript Vol. 3, p. 435. But Spencer's tenure process took place three years earlier—which is hardly close enough in time to be a legitimate comparator—and there were different officials serving at that time. *Id.* at 432-35 (testifying that Snowden was the acting president and C.W. Mangrum the dean). Moreover, Spencer admitted his own experience—not Plaintiff's—was viewed as the outlier. *See id.* at 447 (Spencer: Claire Stubblefield "was definitely of the opinion that you shouldn't be allowed to intervene" like happened with me, and she told me my situation was "unusual."). Regardless, this all ignores the fact that it is undisputed that before denying tenure, Defendants *did* offer Plaintiff the chance to improve. *See, e.g.*, Trial Transcript Vol. 1, p. 68 (Plaintiff: Scoufos "said, in return for withdrawing my application, that, in the following year, I could … [re]apply for tenure, and then the year after that, for promotion."). In other words, the end result for Spencer and Plaintiff was essentially the same—if Plaintiff had accepted Defendants' offer, that is.

Plaintiff also cites the fact that the faculty committee recommended tenure to attack Defendants' reasons for denying tenure. But a disagreement between faculty

and the administration, no matter how fierce, simply cannot be the basis to discredit the administration's legitimate non-discriminatory reasons for denying tenure. *Cf. DePaula*, 859 F.3d at 970–71 ("Evidence that the employer 'should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer's explanation is unworthy of credibility." (citation omitted)). That is especially the case here, where two of Plaintiff's own witnesses testified that a positive view of Plaintiff's transgender identity—rather than a purely objective look at Plaintiff's qualifications—potentially led the faculty committee to recommend tenure in the first place. *See* Trial Transcript Vol. 3, p. 454 (Spencer: "Lisa Coleman did raise the transgender issue. … [I]t was going … against her [Plaintiff], and then … this [issue] gets thrown out there and people talk about it …. Then, finally … a vote is taken and it was the majority to approve."); *Id.* at 476-77 (Prus: "The transgender issue was there [during the discussion]."). Right or wrong, the administration certainly wasn't required to take the same view.

Finally, Plaintiff relies on Parker's expert report comparing the qualifications of various tenure candidates to demonstrate pretext. *See Etsitty*, 502 F.3d at 1227 ("[P]laintiff may show pretext 'by providing evidence that he was treated differently from other similarly-situated, nonprotected employees.'" (citation omitted)). But this fails for the same reason mentioned above. That is, Plaintiff has not produced the 2009 portfolio, Parker admitted as such, and thus his testimony as to the relative merits between Plaintiff's original portfolio and other tenure candidates has no

foundation and cannot be used to demonstrate pretext. Indeed, for these and other reasons discussed below, Defendants believe Parker's testimony should have been excluded altogether. Defendants incorporate those arguments here.

B. Plaintiff produced insufficient evidence that Defendants discriminated by denying Plaintiff the opportunity to reapply for tenure in 2010-11.

Assuming Plaintiff made out a *prima facie* case of discrimination in Defendants' denial of the opportunity to reapply for tenure, Defendants provided at least two legitimate, non-discriminatory reasons for doing so: (1) Defendants' rules and practices do not allow for multiple applications; and (2) Plaintiff was nevertheless offered the opportunity to reapply for tenure and turned it down. The burden thus shifts back to Plaintiff, who has not provided sufficient evidence of pretext.

First, the relevant rule states—as various witnesses acknowledged at trial—that a tenure-track candidate can apply for tenure in their "fifth, sixth, *or* seventh" year. (*See Excerpt from Plaintiff's Trial Exhibit 4 (Rule 4.6.3)*, at Bates EEOC000331-32, attached as Exhibit 1). The use of the word "or" (rather than "and") makes it plain that tenure-track professors must pick one of those years to see their application all the way through. Certainly, various witnesses testified at trial that it was their understanding that multiple applications were allowed, and the faculty appellate committee held so, as well. *See, e.g.*, Trial Transcript Vol. 3, p. 501 (Knapp); Trial Transcript Vol. 5, p. 811 (Charles Weiner). But this cannot be sufficient to dispute the plain text of the rule when none of these witnesses, including Plaintiff, was able to point to a single person in school history who was allowed to reapply for tenure

after being denied by the President.[6] *See, e.g.*, Trial Transcript Vol. 3, p. 506 (Knapp). In other words, their opinion on the rule appears to have no actual foundation in reality; at minimum, none was provided, and it was Plaintiff's burden to have done so.

The plain text view, on the other hand, is buttressed by other evidence. Former President Snowden, for example, testified that "[a]t the seven universities where I've worked, I don't know of any case where someone has been able to reapply for tenure after they've been denied." Trial Transcript Vol. 5, pp. 787-88. This view was further supported by at least one of Plaintiff's own witnesses, Prus, who agreed that a candidate could only apply in one year and not three. Trial Transcript Vol. 3, p. 487. It was also supported by the actions of Plaintiff and Plaintiff's supporters. If Rule 4.6.3 allowed for multiple re-applications, as Plaintiff alleges, then Plaintiff's withdrawing of a tenure application in 2008 makes zero sense. Why not see it through, just in case, and then reapply later? We were never told. And why did the faculty need to rewrite the policy afterward, as Cotter-Lynch testified, to allow for multiple reapplications? Trial Transcript Vol. 2, p. 370. Again, this action makes little sense if the rule already allowed for successive reapplications. In the end, the burden was on Plaintiff to provide enough evidence to show that Defendant's reliance on the plain language of the policy was pretextual, and Plaintiff failed to do so. *See DePaula*, 859 F.3d at 970-71 ("In determining whether the proffered reason for a decision was

[6] When asked at trial, Plaintiff refused to even attempt to address this glaring deficiency. Trial Transcript Vol. 1, p. 185.

pretextual, we examine the facts as they appear to the person making the decision, and do not look to the plaintiff's subjective evaluation of the situation. … [T]he relevant inquiry is whether the employer honestly believed those reasons and acted in good faith upon those beliefs." (citation and internal marks omitted)).

Second, it is undisputed that Defendants actually *did* offer to let Plaintiff reapply for tenure, *if* Plaintiff would withdraw the 2009 application (as Plaintiff had done in 2008). *See, e.g.,* Trial Transcript Vol. 1, pp. 133-34 (Plaintiff); Vol. 3, p. 403 (Mischo); Vol. 4, pp. 590-91 (Scoufos). Plaintiff refused to do so. Plaintiff claims that this offer was an illegitimate ultimatum, but there was precious little evidence of illegitimacy introduced, and certainly not enough to allow a reasonable jury to find pretext on the part of Defendants. Most prominently, of course, Plaintiff alleges that the offer wasn't legitimate because it wasn't in writing. But, despite claiming to have documented the entire situation thoroughly, Trial Transcript Vol. 1, p. 119, Plaintiff never complained about that fact at the time of the offer, nor indicated that Plaintiff had ever even *asked* for the offer to be in writing. *Id.* at 133-34. And regardless, even if Defendants had refused to put it in writing, Plaintiff has pointed to no requirement that an offer be put in writing before it can become legitimate. In the end, Plaintiff was given an opportunity to reapply, and declined to do so. Plaintiff has not produced sufficient evidence to dispute these facts in the least.

Finally, the same point made for the previous claim—that no sex-stereotyping evidence against the actual decision maker has been produced—applies here but even more so. Plaintiff makes it perfectly clear, as does other evidence, that Scoufos had

nothing to do with denying Plaintiff the ability to reapply for tenure. *See, e.g., id.* at Trial Transcript Vol. 1, p. 92 (Plaintiff: "Doug McMillan had made the decision that I was not to be allowed to reapply for tenure promotion in 2010-11."); *id.* at 111 (Plaintiff: President Minks was the deciding vote on appeal); Vol. 4, pp. 593, 617 (Scoufos: I was not involved with the decision to deny Plaintiff the opportunity to reapply for tenure.); *id.* at 678 (McMillan: I had President Minks' permission to extend offer to Plaintiff giving an extra year for tenure.). Thus, any evidence of sex stereotyping on Scoufos's part is irrelevant.

C. Plaintiff failed to produce any evidence that Defendants retaliated because of Plaintiff's complaints.

Plaintiff claims that it is virtually self-evident that Defendants' declining to allow Plaintiff to reapply for tenure in 2010-11 was retaliation for Plaintiff complaining about Defendants' allegedly discriminatory behavior in denying tenure in 2009-10. Trial Transcript Vol. 1, p. 95. Plaintiff, however, did not produce actual evidence sufficient to send a retaliation claim to the jury.

1. Plaintiff failed to make a prima facie case of retaliation by demonstrating a causal connection between the reapplication denial and Plaintiff's complaints.

To make a Title VII retaliation claim, a plaintiff must establish a *prima facie* case, meaning she must show: "(1) she engaged in protected opposition to discrimination; (2) she suffered an adverse action that a reasonable employee would have found material; and (3) there is a causal nexus between her opposition and the employer's adverse action." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086 (10th Cir. 2007) (citation omitted). Here, Plaintiff failed to establish the third prong—

a causal connection—which requires "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004).

Most significantly, Plaintiff has provided no evidence showing that, when Plaintiff engaged in protected conduct, Defendants even considered it a possibility that Plaintiff could reapply for tenure. Rather, all the evidence points the other way, toward the rather obvious conclusion that Defendants believed themselves bound by the rules and situation to deny Plaintiff the opportunity to reapply for tenure from the moment they denied tenure in the first place. Indeed, this is "self-evident"—to borrow Plaintiff's term—from the undisputed offer made to Plaintiff: Withdraw now in order to reapply later. Logically, this indicates that the moment Plaintiff refused the offer, Defendants—rightly or wrongly—felt they had no grounds on which to allow Plaintiff to reapply, and that any subsequent protected conduct was irrelevant to the equation. Plaintiff has produced no evidence indicating otherwise. Nor has Plaintiff produced evidence that Defendants' allegedly retaliatory actions "closely followed" the protected conduct, although even if Plaintiff had, it wouldn't nullify the first point.

2. Plaintiff failed to demonstrate that Defendants' non-discriminatory reasons for declining to allow Plaintiff to reapply for tenure were pretextual.

Even assuming Plaintiff established a prima facie case that Defendants retaliated by declining to let Plaintiff reapply for tenure, Plaintiff's claim would still fail as a matter of law for the same reason as Plaintiff's second discrimination claim fails above. In short, Defendants have provided legitimate, non-discriminatory reasons—the rules do not allow it, and Defendants *did* offer Plaintiff a chance to

reapply—and Plaintiff failed to show those reasons are pretextual. Thus, the Court should grant Defendants judgment as a matter of law on retaliation.

II. MOTION FOR A NEW TRIAL

Under Rule 59 of the Federal Rules of Civil Procedure, the Court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(1)(A). This encompasses a variety of issues, and as a result trial courts have wide discretion in deciding whether to grant a new trial. *See Snyder v. City of Moab*, 354 F.3d 1179, 1187–88 (10th Cir. 2003). Here, Defendants move for a new trial on three different grounds: (1) Plaintiff produced insufficient and tainted evidence of discrimination and retaliation; (2) the Court should not have allowed Parker to testify as an expert, and (3) a clearly excessive amount of damages was awarded by the jury.

A. Plaintiff's evidence of discrimination and retaliation was insufficient and illegitimately tainted by religious bigotry.

"Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence." *Id.* (citation omitted). Here, the verdicts were clearly against the weight of the evidence in this case, for reasons thoroughly detailed above. Most significantly, Plaintiff insisted on putting on an impermissible transgender identity case rather than a sex stereotyping case. Several additional and important points should be mentioned, however, even if they do not fit neatly into one of the aforementioned categories discussed above (*e.g.*, *prima facie* case, pretext, etc.).

For starters, it is not insignificant that Plaintiff's cover letter for the 2009-10 tenure application was undisputedly poor and ill-conceived, as acknowledged by Plaintiff's own witnesses. *See, e.g.*, Trial Transcript Vol. 2, p. 285 (Parker: Plaintiff's 2009-10 cover letter contained a grammatical error); Trial Transcript Vol. 3, p. 441 (Spencer: Plaintiff's "letter of application was unprofessionally written. I mean … my heart sort of sank when I first read it."); *Id.* at 464-65 (Prus: "[T]he cover letter lacked professional competence. … It didn't make sense."). Anyone who screens job applicants—a judge screening for law clerks, to give one familiar example—knows well that first impressions really do matter. And despite some testimony that Plaintiff was comparable to others who were awarded tenure, nary a soul testified that these other candidates submitted as poor a cover letter as did Plaintiff.

Far more disturbingly, the evidence in this case was tainted by Plaintiff's repeated (and unproven) insinuation that McMillan's religion and religious beliefs caused him to discriminate against a transgender person. This anti-religious animus first became apparent during House's testimony, where Plaintiff asked if McMillan "frequently" brought "up his religion at work"—heaven forbid!—whether that made House feel "uncomfortable," and whether McMillan ever made "an employment decision … on the basis of his religion[.]" *Id.* at 511. What Plaintiff's attorney omitted—and what Defendants were forced to spend precious time revealing—was that the employment decision referenced was when McMillan found House a new job, rather than let her go, in part because "the Bible says that we take care of our widows." *Id.* at 541. That this gracious example was used underhandedly to insinuate

wrongdoing by McMillan is disgusting, and is itself a form of religious bigotry that should have no place on our legal system.

Things would only get worse from there, however, when Plaintiff's attorney had the temerity to attack McMillan on cross-examination for having "felt the need to discuss [his] faith here today" when it was Plaintiff who had raised religion in the first place, forcing Defendants to rebut. Trial Transcript Vol. 4, p. 697. Finally, in the closing, Plaintiff's attorney made the following astounding statement: "Frankly, you'd think that a *true* man of faith might just come out and confess to doing the obvious. Something was rotten at Southeastern. I guess he's not yet ready to admit it. But we all saw it. As Knapp told us, it all went back to McMillan." Trial Transcript Vol. 5, p. 841 (emphasis added). In other words, Plaintiff's closing argument was anchored by the scurrilous accusation that McMillan wasn't the sincere religious adherent he supposedly claimed to be because he wouldn't admit his guilt.[7] As the Supreme Court's recent *Masterpiece Cakeshop* opinion made clear, there is no place in our court system for this kind of religious hostility and animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018) ("The neutral and respectful consideration to which Phillips was entitled was compromised here … [by] a clear and impermissible hostility toward [his] sincere religious beliefs …. [T]hese

[7] Plaintiff never actually asked McMillan to describe his religious beliefs or respond to House, nor did Plaintiff ever offer any evidence at all that McMillan's religious beliefs somehow compelled him to take issue with Plaintiff's gender identity, all of which indicates that Plaintiff's bringing up the religion issue in the first place was less about getting to the truth and more about perniciously insinuating, without proof, that McMillan was bigoted simply because he was religious.

disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs . . . ."). The Court could grant a new trial on this issue alone.

Finally, Defendants were handicapped throughout trial by Plaintiff's procedural follies and bizarre actions. Examples abound: (1) Plaintiff's attorneys waited until the literal last second to provide and label exhibits and subpoena witnesses, *see, e.g.*, Trial Transcript Vol. 1, p. 6 (Court to Plaintiff's attorneys: "Do you have sticker numbers on each exhibit? . . . That should have been done days if not weeks ago."); *Id.* at 190 (Court to Plaintiff's attorneys: "I understand that defendants have *been at a disadvantage* without having marked exhibits. . . . This is just not acceptable." (emphasis added)), (2) Plaintiff's attorneys released expedited transcripts of the trial on the Internet as soon as they were received, Trial Transcript Vol. 4, p. 557 (Court: "I've never had this come up before . . . . It makes me very uncomfortable."), and (3) Plaintiff essentially refused to answer questions on the stand, *see, e.g.*, Trial Transcript Vol. 1, p. 172 (Court: "If this witness would only answer a question, I would stand up and cheer. This is painful. … You do have to let her answer the question even if she's never going to answer a question."). True, in the Tenth Circuit a motion for a new trial probably does not include credibility determinations, *see Snyder*, 354 F.3d at 1187–88,[8] but it is still widely accepted that motions for a new trial give courts more flexibility and discretion than motions for

[8] "[T]he Tenth Circuit's position regarding the standard for viewing the evidence when determining a rule 59 motion for new trial is in tension with the weight of modern authority." *Sec. & Exch. Comm'n v. Goldstone*, 233 F.Supp.3d 1169, 1198 n.15 (D.N.M. 2017) (collecting cases). The Tenth Circuit should reverse this wayward line of cases, which would allow this Court to take credibility into account.

judgment as a matter of law, in part because the remedy (a new trial, rather than judgment) is less harsh for the opposing party. *Cf. Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. 1962) (Murrah, C.J., authoring) ("[T]he granting of a new trial involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself."). Here, due to the lack of evidence produced, the religious hostility evinced, and the procedural shenanigans undertaken, the Court should grant a new trial.

B. Parker's expert testimony should have been excluded.

Before trial, Defendants moved to exclude Plaintiff's proposed expert, Parker, from testifying, arguing (among other things) that tenure decisions are inherently subjective and that Parker's analysis was flawed and unreliable. [Doc. 98]. The Court denied this motion, holding that Parker would be allowed to testify as to his "consideration of Dr. Tudor's work, and his comparison of that work to other applications who were offered tenure" because it would "be helpful to the jury," which "has no experience or knowledge of how the tenure process works" and "what methodology is used to evaluate their qualifications or scholarship." [Doc. 163, at 3-4]. Defendants now incorporate their earlier arguments, *see* [Docs. 98 and 155], and emphasize the following additional points—based on Parker's actual testimony—for why Parker should have been excluded and why Defendants were unfairly prejudiced by his testimony, and therefore the Court should grant a new trial.

First, Parker admitted that his testimony lacked foundation. Specifically, as referenced above, Parker admitted that the version of Plaintiff's portfolio he was given to analyze as an expert was partial and incomplete. Trial Transcript Vol. 2, pp. 229, 250; *see also Id.* at 278 (Parker: "I don't know what was submitted [in 2009].") This alone means he should not have been allowed to testify. For, even assuming his expertise was otherwise reliable, how could he accurately compare different portfolios if he did not have the complete versions or know what was in them?

Second, Parker's trial testimony turned out to be remarkably subjective. On the stand, he emphasized that a "good syllabus . . . tells a story." *Id.* at 249. He noted that he "really enjoyed" Plaintiff's "wonderful" course descriptions, which were "fun to me." *Id.* at 250. In commenting on Plaintiff's articles, he talked about how "serious" they were, how "strong" they were, and how much they "advance[d] a discussion." *Id.* at 263-64. None of this is the language of an objective analysis, and it certainly didn't merit an explicit label of "expert." This is especially the case when every other witness who testified, with the exception of House, also had a level of expertise on tenure applications and yet did not get the label "expert" bestowed on them. *Compare, e.g., id.* at 224 (Parker: I have reviewed 25 portfolios outside my own university), *with* Trial Transcript Vol. 5, pp. 765-66 (Snowden: I have reviewed maybe a "thousand" tenure and promotion portfolios at multiple universities.). Furthermore, it is worth noting that Plaintiff's own witness and tenured professor, Mischo, backed up Defendants' arguments about the subjective nature of a tenure decision. On the stand, Mischo agreed that the process of evaluating tenure and promotion portfolios

is "inherently subjective," and that two professionals can look at the same tenure portfolio and come to completely different conclusions. Trial Transcript Vol. 3, pp. 415-16.

Third, even if Parker had Plaintiff's full and original 2009 portfolio (which he did not), his testimony did not take into account key local factors, which makes it utterly unreliable. It was undisputed at trial that then-Dean Scoufos had very strict formatting and procedural requirements for tenure portfolios, and no one has challenged the legitimacy of these requirements. Cotter-Lynch, for example, testified that Scoufos "told me what font to use. She told me what store to go to [in order] to buy which shade of blue binder that would match the school colors. It was really detailed." Trial Transcript Vol. 2, p. 311; *see also* Trial Transcript Vol. 3, p. 513 (House: "[Scoufos] adopted how she wanted each portfolio to look, you know, the same. And so she had them put them in sleeves, certain sleeves, books, binders, and in a certain category order."). And Spencer, another of Plaintiff's witnesses, testified that Plaintiff's application strayed from this formatting: "There were three binders, so it seemed, if anything, there was too much. I was under the impression that we had a set format we were supposed to submit …. So that was a bit unusual, as well." *Id.* at 442-43. Parker, however, openly admitted that he had not seen Scoufos's technical and formatting requirements, "so I can't comment on that." Trial Transcript Vol. 2, p. 280. But these requirements were undisputedly a critical part of Defendants' tenure process at the time. For Parker not to even know what they are, much less

how they affected the portfolios he reviewed, renders his testimony highly unreliable and an unhelpful and misleading influence for a jury.

Parker's lack of knowledge likely helps explain why his testimony was so different from the testimony of Plaintiff's own witnesses. While Parker repeatedly testified that all of the candidates he reviewed were "impressive" and "strong," *id.* at 254, and indeed, "stronger than I'm accustomed to seeing," *id.* at 255,[9] Spencer testified that Plaintiff's application "was *not* a strong application … I would even say it was weak." Trial Transcript Vol. 3, pp. 444-45 (emphasis added). But even though Parker didn't have foundation, or knowledge of the original portfolio or the local procedures—like Spencer did—Parker received the label of "expert." *See, e.g.*, Trial Transcript Vol. 2, p. 218 (Plaintiff's attorney: "I think it would be very helpful for our jury to sort of understand these concepts better coming from an expert."). This is unfair, and it was unfairly prejudicial. A new trial should be granted.

C. Plaintiff failed to provide sufficient evidence to support the award, therefore a new trial or remittitur is appropriate.

Prior to judgment being entered, Defendants argued that the Court should reduce Plaintiff's award below the Title VII statutory cap of $300,000 because of a near-total lack of evidence supporting a $300,000 award. [Docs. 289 and 291]. Defendants renew and incorporate those arguments now. In sum, Plaintiff has now affirmatively waived emotional distress damages, which were allowed at trial, and Plaintiff offered very little evidence or case law in support of a $300,000 award for

[9] This quote is yet another reason to disallow Parker as an expert. He is basically admitting that he is out of his element in analyzing these candidates.

reputational or other non-emotional distress harms only. Thus, the current award is excessive and the Court should order a new trial or remittitur to a more reasonable amount.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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