CASE NO. 15-cv-324-C

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff/Intervenor

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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

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DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION FOR SUMMARY JUDGMENTAND BRIEF IN SUPPORT

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to Fed. R. Civ. P. 56(a) and LCvR 56.1 move this Court for summary judgment in their favor[1], showing the Court as follows:

INTRODUCTION

In 2004 Dr. Robert Tudor was hired at SEOSU in the English, Humanities, and Languages Department ("EHL") as a tenure-track professor. In 2007 Dr. Tudor began using the name "Rachel," and transitioned from presenting himself as a man

[1] The sole remaining party adverse to Defendants is Intervenor, Dr. Rachel Tudor. If the Court later determines that Plaintiff, United States of America, should

to presenting herself as a woman. In 2008 Dr. Tudor ("Intervenor" or "Tudor") made an abortive attempt to apply for tenure. At a most preliminary level the EHL committee voted 0-5 against recommending her for tenure. Then after a conversation with her department chair, Intervenor withdrew her application before it could be sent to the Dean and higher administration for consideration. In 2009 Intervenor again submitted her application for tenure, this time receiving enough committee votes (4-1) for her application portfolio to be sent up for administrative consideration. Intervenor's portfolio was then reviewed independently first by the Dean, and then by the Vice-President for Academic Affairs, both of whom had concerns about Intervenor's application and recommended against the granting of tenure. In an attempt to assist Intervenor, the administration decided to offer her an opportunity to withdraw her portfolio prior to denial, and then to have an extra time period in which to improve her portfolio. At the time, she was warned that if the portfolio were allowed to continue being considered, tenure would be denied. Intervenor ignored the academic and professional advice she received from administrators (the decision makers) at SEOSU, and pushed forward with a deficient tenure application, with full knowledge she would not succeed. The result of Tudor's selfish and cavalier approach to the tenure process was that Intervenor's application for tenure was denied. Rather than accept personal responsibility for her own inadequacies in a very detail-oriented process, Tudor began first by submitting internal procedure grievances at the university, and then by filing external charges of discrimination against the State with the United States of

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continue in this litigation then Defendants reserve the right to file a separate

America's ("Plaintiff" or "USA") "Department of Education" ("DOE"), even claiming racial discrimination. After nearly five (5) years Plaintiff finally filed its lawsuit. Intervenor then joined the lawsuit. While USA and Defendants have resolved their dispute via a mutually acceptable settlement agreement, Intervenor's claims remain. Given that no material facts are genuinely disputed at this point, Defendants SEOSU and RUSO move this Court for summary judgment on all counts.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Intervenor was born a male, Robert Tudor, in 1963. *Deposition of Intervenor* at p. 118, ln. 4-8, attached as Exhibit 1.

2. Intervenor began work at SEOSU the fall of 2004. *Id.* at p. 86, ln. 19-24.

3. Intervenor presented herself as a male from 2004-2007, then presented herself as a female from 2007 to 2016. *Id.* at p. 131, ln. 5-9.

4. From 2007 until after the denial of her tenure portfolio in 2010, Intervenor submitted no written complaints (to any person or entity) alleging unlawful harassment, hostile work environment, discrimination, or retaliation against SEOSU, RUSO, or any of their employees. *Intervenor's Response to RUSO's Interrogatory No. 2,* attached as Exhibit 2.

5. The tenure and promotion portfolio review process at SEOSU is a multi-tiered process going up from academic department, to dean, then to

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dispositive motion *vis a vis* that entity.

vice-president for academic affairs, then to the university president. *Deposition of Jesse Snowden* at p. 45, ln. 24 – p. 46, ln. 6, attached as Exhibit 3.

6. During the 2008-2009 academic year, ("AY08-09"), Intervenor submitted her portfolio to the English, Humanities, and Languages Department ("EHL") for promotion and tenure consideration. Ex. 1 at p. 31, ln. 9-11.

7. During AY08-09, the EHL promotion and tenure committee voted unanimously against Intervenor receiving further tenure consideration. *Deposition of Lucretia Scoufos* at p. 64, ln. 14-20; p. 152, ln. 21-23, attached as Exhibit 4.

8. After the vote against her portfolio, and followed by her conversation with the EHL Department Chair during AY08-09, Intervenor withdrew her tenure application from further consideration. Ex. 1 at p. 175, ln. 6-21.

9. During the 2009-2010 academic year, ("AY09-10"), Intervenor again submitted her portfolio to the ("EHL") Department for promotion and tenure consideration. *Id.* at p. 31, ln. 9-11.

10. During the AY09-10, the EHL promotion and tenure committee voted 4-1 in favor of allowing Intervenor's portfolio to receive tenure consideration from the SEOSU administration. *Deposition of Randy Prus* at p. 145, ln. 5-7, 25 - p. 146, ln. 5, attached as Exhibit 5.

11. After Intervenor's AY09-10 portfolio left the EHL committee it was reviewed by then-Dean Lucretia Scoufos ("Dean Scoufos"), who did not recommend Intervenor for promotion and tenure because Intervenor did not have the credentials. Ex. 4 at p. 103, ln. 23-25.

12. After Intervenor's AY09-10 portfolio moved from Dean Scoufos up the administrative chain it was reviewed by then-Interim Vice-President for Academic Affairs Douglas McMillan ("VP McMillan"), who did not recommend Intervenor for promotion and tenure. *Deposition of Doug McMillan* at p. 114, ln. 21-23, attached as Exhibit 6.

13. Among reasons cited by VP McMillan for not recommending Intervenor's portfolio for promotion and tenure was that in his "professional judgment, [Intervenor's scholarship] didn't reach that noteworthy and exceptional standard that the service did not meet the [] requirement from policy." *Id.* at p. 115, ln. 16-18.

14. After VP McMillan completed his review of Intervenor's AY09-10 portfolio, he sent it to then-President Dr. Larry Minks on or about February 10, 2010. *Id.* at p. 109, ln. 4-11.

15. Prior to a final denial of Intervenor's tenure application in AY09-10, Intervenor was given the opportunity by SEOSU to withdraw and improve her portfolio, to be reconsidered in a later academic year. Ex. 4 at p. 152, ln. 10 – p. 153, ln. 6.

16. VP McMillan, Dean Scoufos, and Dr. John Mischo (then-Chair of the EHL Department) agreed that this was a generous offer, amounting to a "gift" to Intervenor. *Id.* at p. 152, ln. 10-12; p. 153, ln. 6, 13-15.

17. On April 6, 2010, Intervenor rejected SEOSU's offer to withdraw and improve her portfolio before final rejection. *Id.* at p. 153, ln. 6-20.

18. Prior to April 30, 2010, Intervenor was informed by then-President of SEOSU, Dr. Larry Minks, that her AY09-10 request for tenure and promotion had been denied. *April 30, 2010 McMillan Memo to Intervenor,* attached as Exhibit 7.

19. Once an application for tenure moves through the administration, if the portfolio is not withdrawn prior to denial by the president, then the professor cannot reapply. Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2 and Ex. 6 at p. 189, ln. 21-24.

20. Intervenor filed her first discrimination charge with the U.S. Department of Education in September 2010 alleging her tenure denial was due to discrimination because she was female and Native American. There was no mention of her transgender status. *September 2010 DOE Charge,* attached as Exhibit 8.

21. In AY09-10 and AY10-11, both men and women received tenure. *Excerpts from SEOSU's Response to EEOC Request for Info.* at Bates No. 459*,* attached as Exhibit 9.

22. At the time of Intervenor's application, once the tenure and promotion process ended the portfolios were returned to the faculty members and no copies were retained by SEOSU. *Id.* at Bates Nos. 1949-1950.

23. After leaving SEOSU, Intervenor claims that she applied for employment at over one hundred (100) institutions of higher education across the United States. *Intervenor's Response to RUSO's Interrogatory No. 11,* attached as Exhibit 10.

24. Despite reportedly applying at over one hundred (100) institutions of higher education across the United States after leaving SEOSU, Intervenor only received one (1) offer of employment. Ex. 1 at p. 90, ln. 8-19.

25. Intervenor's only offer of employment was at Collin College, a community college in Texas. She accepted that offer. *Id.* at p. 90, ln. 8-19; p. 100, ln. 10-14.

26. During her employment at Collin College, Intervenor received a "notable number of evaluations that described her instruction as unclear and her classroom management as inadequate," and having a "need for improvement." *Excerpts from Intervenor's Collin College Personnel File,* at CC270, attached as Exhibit 11.

27. During her employment at Collin College, Intervenor received notification that her "service to Collin College does not meet Collins' standard of excellence." *Id.* at CC268.

28. During her employment at Collin College, Intervenor received notification that her "professional development does not meet Collins' standard of excellence." *Id.* at CC268.

29. During her employment at Collin College, Intervenor received notification that her "simply maintaining membership on committees does not constitute substantive service." *Id.* at CC270.

30. During her employment at Collin College, Intervenor received notification of student complaints about her instruction, and that these complaints were consistent with prior student complaints. *Id.* at CC270.

31. During her employment at Collin College, Intervenor received notification that while "she does not see a need for improvement in her instruction or classroom management" that "stance [] is inconsistent with the dean's assessment." Further, it was noted that "[t]he service she has provided continues to be adequate, not outstanding." *Id.* at CC270.

32. Intervenor started work at Collin College in 2012, and was then non-renewed by that school in spring 2016. Ex. 1 at p. 90, ln. 4-6; Ex. 11 at CC1059-CC1065.

33. Unable to take responsibility for her own shortcomings as an instructor, Intervenor accused Collin College of discriminating against her based on her transgender status. Ex. 11 at CC1061-1065.

34. SEOSU had an anti-sexual harassment policy in effect, including a grievance procedure, during Intervenor's employment. *SEOSU Anti-Sexual Harassment Policy,* attached as Exhibit 12.

35. SEOSU had an equal opportunity and anti-discrimination policy in effect during Intervenor's employment. *SEOSU Equal Opportunity and Anti-Discrimination Policy,* attached as Exhibit 13.

36. Intervenor never submitted a complaint or grievance about any allegedly harassing statements. Ex. 1 at pp. 306-307.

37. In June 2007, Intervenor had a conversation with HR Director, Ms. Cathy Conway, during which Conway offered optional use of a single-occupancy, unisex, handicap accessible restroom in Intervenor's building, (as well a family

restroom in the student union), should Intervenor want or need it during her transition. *Deposition of Cathy Conway,* at p. 48, ln. 15-21, attached as Exhibit 14.

38. Intervenor thanked Ms. Conway for her professionalism at the end of her conversation about restroom options. *Id.* at p. 48, ln. 21-22.

STANDARD OF REVIEW

Summary judgment shall be granted when the moving party demonstrates that it is entitled to judgment as a matter of law because there is no evidence – considering the pleadings, depositions, answers to interrogatories, along with affidavits – to support the claims of the nonmoving party or that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). An issue is "genuine" only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit." *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that no genuine issue of material fact exists. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1190. The court must "'view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (quotation omitted). Although

Intervenor is entitled to all reasonable inferences from the record, she must still marshal sufficient evidence requiring submission of the matter to the jury in order to avoid summary judgment. *Piercy v. Maketa*, 480 F.3d 1192, 1197 (10th Cir. 2007). Thus, if Intervenor bears the burden of persuasion on a claim at trial, then summary judgment may be warranted if (a) Defendants point out a lack of evidence to support an essential element of that claim, and (b) Intervenor cannot identify specific facts that would create a genuine issue. *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1143-44 (10th Cir. 2013).

ANALYSIS AND AUTHORITY

I. INTERVENOR HAS NOT ESTABLISHED A PRIMA FACIE CLAIM OF HOSTILE WORK ENVIRONMENT. (COUNT ONE)

a. The *prima facie* case

A hostile work environment is one which is permeated with discriminatory intimidation and ridicule sufficiently severe or pervasive as to be abusive to a reasonable individual. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). To establish a *prima facie* case of hostile work environment based on sex, a plaintiff must establish that (1) she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and it created an abusive working environment. *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1134 (10th Cir. 2005).

In order to be actionable, a sexually objectionable environment must be both objectively and subjectively offensive: one that a reasonable person would find

hostile or abusive, and one that the particular plaintiff in fact perceived to be so. *Id.* at 370-371. Title VII does not establish a general civility code for the workplace, and a plaintiff may not predicate a hostile work environment claim on run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in the workplace. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015). "Therefore, to avoid summary judgment at the prima facie stage, a plaintiff must present evidence that creates a genuine dispute of material fact as to whether 'the workplace is permeated with discriminatory intimidation, ridicule, and insult[] that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'" *Id.* (citing *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 851 (10th Cir. 2007)).

Based solely upon the false and unsupported allegations in Intervenor's Complaint, one might mistakenly conclude the existence of a hostile work environment. But these claims can quickly be put to rest because they have absolutely no factual basis or evidentiary support, despite the seven years of discovery conducted by the EEOC, U.S.A., and/or Intervenor. Intervenor's vague, conclusory allegations include:

> Southeastern's administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping…

[Doc. 24, ¶ 131].

> Dr. Tudor was targeted for harassment by administrators because of her sex…

[Doc. 24, ¶ 132].

> The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficient severe or pervasive…

[Doc. 24, ¶ 135].

However, a review of the **specific occurrences** upon which Intervenor relies reveal a complete lack of evidentiary support for her claim that these incidents occurred or that they created a hostile work environment:[2]

> 1) A one-time incident (for which Tudor is uncertain of either date or year) of a double hearsay statement, allegedly made by Dr. McMillan to Jane McMillan, who then allegedly repeated it to Dr. Tudor, that Dr. McMillan "objected to the transgender lifestyle."

(Ex. 1 at p. 298, ln. 25 – 299, ln. 24); [Doc. 24, ¶ 136].

> 2) A one-time incident in June 2007 when SEOSU's Human Resources Director, Cathy Conway, supposedly told Tudor she was prohibited from using the multi-stall women's restrooms on campus;

(Ex. 1 at p. 305, ln. 20-24); [Doc. 24, ¶ 137];

> 3) A one-time incident in June 2007 of SEOSU's Human Resources Director, Cathy Conway, supposedly counseled Tudor about not wearing short skirts or inappropriate make-up

(Ex. 1 at p. 305, ln. 3 – p. 306, ln. 4);

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[2]None of these alleged harassing events can be considered because none of them occurred within 300 days of Intervenor's initial discrimination charge, filed with U.S. Department of Education, in September 2010. [Doc. 1, ¶ 59]. Under Title VII, an employee must file a charge with the EEOC within 300 days of the discriminatory conduct. 42 U.S.C. §2000e-5(e)(1). While certain circumstances permit hostile work environment claims to rely in part on conduct that occurred outside the 300 day limitations period, those circumstances are not present here. To consider pre-limitations period conduct, those acts must comprise "part of the same actionable hostile work environment practice" that continued into the limitations period. *Duncan v.Manager, Dep't of Safety*, 397 F.3d 1300, 1308-1309 (10th Cir. 2005) The pre- and post- limitations period incidents must involve the same type of employment actions, occur relatively frequently and have been perpetrated by the same managers. Here, there are no post-limitations period incidents, much less incidents that occurred with frequency.

4) Hearsay statements of a couple of comments in 2007 that may have included misgendering, i.e. someone referring to Dr. Tudor as "he," or using masculine pronouns after Tudor's gender transition; and

5) Defendants provided a health insurance plan with an exclusion for transgender health care (Tudor submits this allegation despite the fact she never sought coverage for any transgender-specific health care).

(Ex. 1 at p. 283-285, 312-313); [Doc. 24, ¶ 146].[3]

All of these alleged comments are untrue, and it is significantly telling that at no time over the remaining four (4) year period of employment at SEOSU did Intervenor complain or submit any type of grievance regarding any of these supposed incidents. (Ex. 1 at pp. 306-309). Health coverage was never denied by SEOSU or RUSO. Even if one assumed the alleged comments were true, these instances fail to demonstrate a work environment permeated with intimidation and ridicule. *See Morris v. City of Colo. Springs*, 666 F.3d 654, 669 (10th Cir. 2012) (failure to complain of incident for several days and continuing to work for employer for three months suggests incident not subjectively severe.) A "few isolated incidents" of "sporadic" offensive behavior, as opposed to "a steady barrage of opprobrious harassment, is not enough to make out a hostile work environment claim, unless those few events amount to such extreme behavior as physical or sexual assault. *Id.* at 665-668; *See also Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) ("five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in

[3] Intervenor never raised the issue of health care exclusions in her DOE/EEOC charges, and therefore, this claim cannot be considered because Intervenor failed to exhaust her administrative remedy regarding this claim.

her presence in a sixteen month period" were not sufficiently pervasive to support a hostile work environment claim); *cf. Witt v. Roadway Exp.*, 136 F.3d 1424, 1428-29, 1432 (10th Cir. 1998) (two incidents over two years where employee was called a "n****r," including "F*** that n****r, he don't have no rights" in response to the employee's complaint, did not constitute a hostile work environment).

The Court must analyze the conduct at issue here with the aforementioned guidelines in mind and determine whether a reasonable jury could find that the subjective and objective effects of the conduct were to pollute the environment with harassing conduct that was, *inter alia*, sexually humiliating, offensive, or insulting, to the extent it is sufficiently severe or pervasive. *Lounds*, 812 F.3d at 1228.

In making the determination of whether an environment is hostile, courts consider all the circumstances, such as frequency and severity of the discriminatory conduct; whether it was physically threatening or humiliating; and whether it unreasonably interfered with an employee's work performance. *Harris* at 370. Isolated incidents, unless extremely serious, will not amount to a discriminatory change in the terms and conditions of employment. *Faragher v. City of Boca Raton,* 118 S.Ct. 2275, 2283 (1998); *Morris v. City of Colorado Springs*, 666 F.3d 654, 664 (2012). In attempting to define the severity of the offensive conditions necessary to constitute actionable sex discrimination, the *Faragher* court looked to prior cases of discriminatory harassment based on race, and noted, "[d]iscourtesy or rudeness should not be confused with racial harassment;" "a lack of racial sensitivity does not, alone, amount to actionable harassment." *Faragher* at 787; citations omitted. The U.S. Supreme Court has made it clear that conduct must be extreme to amount

to a change in the terms and conditions of employment. *Id.* at 788. Without question, the evidence here falls so far short of discriminatory harassment that **no reasonable person** could find it to be objectively or subjectively hostile or abusive.

b. Remedial measures not pursued

If a hostile work environment is established, then liability is imputed to the employer through a theory of vicarious liability, subject to the defense that the employer took reasonable care to prevent (and promptly correct) harassing behavior and the employee unreasonably failed to take advantage of the preventative and corrective opportunities available. *Faragher* at 2292-2293 (1998); *Burlington Industies, Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998). The hostile environment methodology effectuates Congressional preference for conciliation rather than litigation by balancing the imposition of vicarious liability with the preventative and remedial measures defense. This encourages the employer in its obligation to prevent violations, and encourages the employee to report harassment before an environment becomes severe and pervasive. *Ellerth* at 2270; *Faragher* at 2292.

Preventative measures include adoption and dissemination of a harassment policy. Remedial measures require prompt investigation once proper notice of harassment is received. *Helm v. Kansas*, 656 F.3d 1277, 1290 (10th Cir. 2011). While an employee of SEOSU, Intervenor ***never*** submitted a complaint or grievance regarding the allegedly harassing statements. Hence, Intervenor never gave Defendants notice (proper or otherwise) of any such supposed harassment, and thus, Defendants were deprived of any opportunity to conduct an investigation of the alleged harassment. Not only did Intervenor deprive Defendants of the

opportunity to employ remedial measures, she also deprived Defendants of the ability to address the veracity of Intervenor's allegations. Of course, this presupposes the statements were ever actually made, and there is no evidence of that. Intervenor's claims of hostile work environment were never brought to Defendants' attention during her SEOSU employment. Had Intervenor given Defendants proper notice then the university or RUSO board would have had the opportunity to investigate the situation, remediate it if necessary, and avoid litigation altogether. Thus, even if the alleged statements occurred, which Defendants deny, Intervenor failed to avail herself of appropriate remedial measures, despite her excessive and extensive use of the university's grievance processes for multiple other reasons.

For example, Cathy Conway, SEOSU Human Resources Director admitted she had a telephone discussion with Intervenor relating to which bathroom Intervenor might initially feel the most comfortable utilizing after beginning her transition. In the single conversation between Ms. Conway and Intervenor, Ms. Conway proposed to Intervenor the option of using the single-occupancy, unisex, handicap accessible bathroom in Intervenor's office building because it was a single-occupant option with more privacy. In response, Intervenor thanked Ms. Conway for the suggestion and for her professionalism. Ms. Conway's notes of this conversation substantiate her recollection. In Intervenor's deposition, she claimed that as a result of this singular conversation in June 2007 she was forced to run all over campus for the next four years, in search of unisex bathrooms, and that she thus endured great embarrassment and humiliation as a result. However, despite

Intervenor's intricate knowledge of SEOSU's grievance process, and her innate willingness to complain, Intervenor never submitted any type of complaint about the alleged bathroom restriction, or about attire, make-up, or any other restrictions supposedly placed upon her by Ms. Conway. There is simply no evidence that these occurred, but more importantly, no evidence of SEOSU's awareness of any harassing conduct. Thus, vicarious liability cannot be imposed on Defendants.

In summary, Intervenor fails to illustrate a hostile work environment. Take the totality of the circumstances, in a light most favorable to Intervenor, her unsubstantiated allegations of isolated instances of harassment fail to show a workplace permeated with sexually based intimidation and ridicule. Furthermore, Defendants were deprived of any opportunities to address Intervenor's accusations, while at the same time Intervenor did not exercise reasonable care to avoid harm. Summary judgment in favor of Defendants should be granted.

II. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF DISCRIMINATION. (COUNT TWO)

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an employee based on their sex:

> It shall be unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1).

Initially, Intervenor bears the burden of proving a *prima facie* case of sex discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);

Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999). A *prima facie* case of discriminatory discharge (or non-renewal in this case) requires Intervenor to show, "(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *Perry*, 199 F.3d at 1135 (citation omitted); *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012) (recharacterizing the fourth factor as "she was treated less favorably than others not in the protected class"). At every stage, Intervenor retains the burden of persuasion under Title VII that she was intentionally discriminated against. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2016 (2000); and Fed. R. Evid. 301.

If Intervenor "establishes her *prima facie* case, a rebuttable presumption arises that the defendants unlawfully discriminated against her." *Perry*, 199 F.3d 1135 (citation omitted). The burden then shifts to the State to "articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff." *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). This is only a burden of production. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993). If such reason is produced, then the presumption created by a *prima facie* case is rebutted and falls away. *Id.* at 507. Once the defendant articulates any valid reason, "the plaintiff can avoid summary judgment ***only*** if she is able to show that a **genuine** dispute of material fact exists as to whether the defendant's articulated reason was pretextual." *Perry*, 199 F.3d at 1135 (citing *Randle v. City of Aurora*), 69 F.3d 441, 451 (10th Cir. 1995)), or not the true reason, *Hicks*, 509 U.S. 508.

a. Intervenor fails to establish a *prima facie* case of discrimination.

Intervenor's Complaint somewhat confusingly asserts either conjunctively or disjunctively that for purposes of Title VII protection her protected status is either (a) that she is specifically a woman, or (b) that she is a woman, thereby potentially cloaking herself with the protected status designation to meet criterion number (1) under *McDonnell Douglas*. However, to the extent Intervenor relies on her status as a transgender person, her *prima facie* case crumbles from the outset. The courts have consistently told us that transgender status is not, by itself, a protected class. The Tenth Circuit Court of Appeals has explicitly stated, ". . . transsexuals are not a protected class under Title VII," *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007). That decision remains undisturbed in this Circuit.

The United States of America, in a recent *amicus curiae* filing in the Second Circuit Court of Appeals case of *Zarda v. Altitude Express*, 15-3775, submitted the following:

> The term "sex" is not defined in Title VII, but as Judge Skyes observed in *Hively* without dispute from the majority, "[i]n common, ordinary usage in 1964 – and now, for that matter – the word 'sex' means biologically *male* or *female*." 853 F.3d at 362 (dissenting op.) (citing dictionaries). As for the term "discrimination," the Supreme Court has held that Title VII requires a showing that an employer has treated "similarly situated employees" of different sexes unequally. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

Brief for Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation as Amici Curiae Supporting

Appellees and Affirmance, Zarda v. Altitude Express, (2015) (No. 15-3775) (United States Court of Appeals for the Second Circuit)[4].

Under *Etsitty*, one's transgender status does not place a person in a protected class. Under the authority and reasoning recently offered by the United States of America, 'sex' means a person's biological status and male or female. Intervenor has not plead, nor can she show, that she is biologically female. This fact precludes her from proving she belongs to the protected class of "female," which precludes her from satisfying the first element under *McDonnell Douglas*.[5]

Intervenor also fails to show that her case meets the second element under *McDonnell Douglas*. Under *Khalik*, Intervenor has not shown that she was treated less favorably than similarly situated employees outside of her protected class. A similarly situated employee is one who shares the same supervisor and is subject to the same standards governing performance along with other relevant employment circumstances. *Green v. New Mexico*, 420 F.3d 1189, 1194-1195 (2005). The law shows us that transgender is not a protected class. If Intervenor hangs the proverbial hat on the notion of membership in the protected class of "female," then the evidence shows us that (a) Intervenor is not biologically female, and (b) that other females were, in fact, given tenure in the same time frame as Intervenor's application. Thus, the second element of *McDonnell Douglas* cannot be met.

[4] Attached for the Court's convenience.

[5] Intervenor was born biologically male, (*See* UMF 1.), and male is not a protected class under Title VII.

Intervenor's *prima facie* case falls further apart at element four of the *McDonnell Douglas* test. A plaintiff has no *prima* facie case if she fails to demonstrate that the job was filled by someone outside the protected class. *U.S. v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981). In *Fuentes v. Perskie*, the Third Circuit ruled that "[i]n a case of failure to hire or promote under Title VII, the plaintiff must first carry the initial burden . . . by showing . . . (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 32 F.3d 759, 763 (3rd Cir. 1994) (internal citations omitted). In *Brown v. Delaware River Port Authority*, the district court there held that once an applicant was rejected for the position, the opening was closed. 10 F.Supp. 3d 556, 561-62 (D.N.J. 2014). Because the position was closed, the plaintiff failed to meet the fourth prong of the *McDonnell Douglas* test.

In *Houston v. Independent School Dist. No. 89 of Oklahoma*, this Court determined that the plaintiff therein failed to make a *prima facie* case because she failed to demonstrate that her position was not eliminated. 2010 WL 988414, at *9 (W.D.O.K). In fact, the *Houston* court found that there was no other person that held the position in question after that plaintiff had left the employer, and that there was no "evidence that the position remained open and available to others." *Id.* Here, Interevenor has failed to show that the tenure position which she sought was either left open after her separation from the University, or that it was filled by any other person outside the protected class.

Interevenor must show that after her non-renewal the job was not eliminated. But Intervenor cannot do that. The tenure position to which Intervenor aspired ceased to exist after her separation from the University. Intervenor cannot show the tenure-track position in that department was filled by any new hire or existing employee. Instead, the classes Intervenor formerly taught were split up among existing faculty.

b. Intervenor was denied tenure for legitimate, nondiscriminatory reasons.

Despite exhaustive (bordering on abusive) Discovery practice, Intervenor has produced zero direct evidence of discrimination. If Intervenor had demonstrated a *prima facie* case (which she has not), then under the *McDonnell Douglas* formula, the burden would shift to the State to demonstrate its legitimate nondiscriminatory reasons for Intervenor's non-renewal. In addition to Intervenor's failure under the University's multi-stage tenure review process - which progresses upward from (a) a committee in the English, Humanities and Languages Department to (b) the Dean of Arts & Sciences, to (c) the Vice-President for Academic Affairs, to (d) the University President, who then makes a recommendation to the RUSO Board –Intervenor demonstrated her lack of qualification by being unable to attain renewal at Collin College, a two-year community college, the only job she was apparently offered after allegedly applying at over one hundred (100) colleges and universities across the nation.

The burden for the State at this point is one of production, not persuasion, and involves no credibility assessment at all. *Reeves v. Sanderson Plumbing*

Products, Inc., 530 U.S. 133, 142 (2000). The State meets "this burden by offering admissible evidence sufficient for the trier of fact to conclude that Intervenor] was [denied tenure] for legitimate, nondiscriminatory reasons." *Id.* (citations omitted). Once legitimate, nondiscriminatory reasons are offered, then the presumptions and burdens against Defendants fall away, and Intervenor still must prove that she was actually discriminated against. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993).

In situations like the present case's determinations of academic tenure, courts have generally made determinations of liability along a sliding scale. According to an article in the *Harvard Law Review*, "as a court's estimation of a particular job's mental difficulty, communication and educational requirements, prestige, and social important increases, the more apt it becomes to require complex, particularized, and convincing evidence [from a plaintiff] before finding that a *prima facie* or conclusive case of discrimination has been established." Tenure and Partnership As Title VII Remedies, 94 Harv. L. Rev. 457, 472 (1980). *See also Sweeney v. Board of Trustees*, 569 F.2d 169, 176 n. 14 (1st Cir.) ("[j]udicial tolerance of subjective criteria seems to increase with the complexity of the job involved"), *vacated on other grounds*, 439 U.S. 24 (1978).

Courts have also found that denials of tenure in particular are inherently subjective, but at the same time courts have repeatedly affirmed a great deference to the decision-makers in tenure determinations. *See Lewis v. Chicago State College*, 299 F.Supp. 1357, 1359 (N.D. Ill. 1969) ("A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and

numerous other intangible qualities which cannot be measured by objective standards.") *See, e.g. Johnson v. University of Pittsburg*, 435 F.Supp. 1328, 1371 (W.D. Pa. 1977) ("In determining qualifications in [these] circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.")

In seeking to rebut a plaintiff's *prima facie* case, a "defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. It is clear from the evidence noted above that there were multiple reviewers of Intervenor's tenure application, and that there were multiple determinations that the University had legitimate, nondiscriminatory reasons for denying Intervenor tenure. And it is also clear that any court reviewing those determinations should grant great deference to the decision makers in academia.

c. Denial of Intervenor's tenure application was not pretextual since she was given the professional judgment of university administrators and an extended period in which to improve her portfolio, coupled with her rejection of those opportunities.

"[S]hould the defendant carry this burden of production of legitimate, nondiscriminatory reasons], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253; *see also Hicks*, 509 U.S. at 510-11 (holding presumption of discrimination disappears once defendant carries its burden of production). "A plaintiff may establish pretext by showing 'such weaknesses, implausibilities inconsistencies, incoherencies, or contradictions in the employer's proffered

legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Santana v. City & Cnty. of Denver*, 488 F.3d 860, 864-65 (10th Cir. 2007) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). "However, 'mere conjecture that [an] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.'" *Id.* (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1998).

"In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*" not "the plaintiff's subjective evaluation of the situation." *Luster v. Vilsack*, 667 F.3d 1089, 1093 (10th Cir. 2011) (emphasis in original) (internal quotation marks and citation omitted). "But a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Intervenor must come forth with evidence that would convince a reasonable finder of fact that State's proffered reasons are unworthy of credence. *Mackenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1278 (10th Cir. 2005) (citations omitted).

Tenure is not to be given lightly. Tenure carries with it significant protections against termination, and is, in effect, a contract for life. *See Huang v. College of the Holy Cross*, 436 F.Supp. 639, 653 (D. Mass. 1977); *Labat v. Board of Higher Educ.*, 401 F.Supp. 753, 756 (S.D.N.Y. 1975). In the present case, Intervenor submitted her tenure portfolio for consideration twice. In her 2008-2009 application,

on her first attempt to receive tenure, the vote in her departmental committee against her portfolio was 0-5. Her second attempt a year later (2009-2010), was given a 4-1 vote, allowing her portfolio to proceed up out of the department. But that vote was not a guarantee of tenure, only permission from her departmental colleagues to seek tenure from the administration above.

During administrative review, first by the Dean of the college, second by the Academic Vice President, and then third by the University President, Intervenor's tenure portfolio was found to be deficient. After it became clear to the administration that Intervenor's portfolio did not merit tenure, a decision was made to offer Intervenor an opportunity to withdraw her current application, take extra time to improve her portfolio, and then resubmit a satisfactory application portfolio. [6] She declined that invitation. The University administration was surprised by Intervenor's decision, but it was hers to make. And she must live with the detrimental effects of her personal and professional decision. The multiple stages of review, coupled with the extraordinary opportunity given to Intervenor (which she rejected), demonstrate without genuine contravention that the University's decision against granting tenure was not pretextual. Intervenor has no evidence to the contrary, and certainly not a preponderance of the evidence. It seems likely that Intervenor regrets her decision to not withdraw her portfolio and improve it, and perhaps she made that decision out of hurt feelings rather than cool

[6] While there may be some dispute as to the length of time Intervenor was offered to improve her portfolio, there is no dispute that she was offered the- opportunity to withdraw her application for tenure prior to its denial so that she could reapply after a period of time with an improved portfolio.

deliberations. But, her refusal to accept the university's gift-like offer does not amount to unlawful discrimination by SEOSU.

Lest Intervenor claim that SEOSU and its administrators were merely conspiring against her unfairly, the evaluation of Intervenor's professional quality was also borne out by the post-separation evidence. Setting aside the great deference courts historically have granted, and should continue to grant, to academia about such issues, Intervenor was judged less than deserving by what she claims are over one hundred (100) higher education institutions, all of which declined to offer her a job. Further, the only one that did offer her a job, (Collin Community College), ultimately did not renew her employment due to its determination that her work performance and product was not sufficient. This third-party, real-world employer's determination about Intervenor's quality as a professor in a higher education setting is telling, and it is supportive and corroborative of SEOSU's determination about Intervenor.[7] Summary judgment should be granted in favor of the University and RUSO.

III. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF RETALIATION. (COUNT THREE)

"Under [*McDonnell Douglas'*] familiar framework, [Intervenor] must first establish a *prima facie* case of retaliation by showing "(1) she engaged in protected opposition to Title VII discrimination; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action." *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1227

[7] Intervenor has been unable to obtain academic employment since her March 2016 nonrenewal by Collin College.

(10th Cir. 2008) (*citing Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1229 (10th Cir. 2004). In the case at bar, Intervenor cannot genuinely show that she was subjected to retaliation by RUSO or SEOSU.

As noted above, transgender is not a protected status under Title VII. Therefore, any purported discrimination on that basis is not prohibited by Title VII and could not serve as the basis for step one of the *prima facie* retaliation analysis under *Fye*, described above. Further, to the extent Intervenor contends she was a woman who suffered gender stereotyping discrimination, there is zero credible evidence of that. The exhaustive Discovery conducted in this case yielded no direct or indirect evidence of gender stereotyping.

It is clear that Intervenor makes no claim of retaliation prior to her not being allowed to reapply for tenure after her portfolio was denied. In fact, Intervenor's Complaint [Doc. 24] makes exactly one (1) factual allegation in purported support of her retaliation claim: that she was denied the opportunity to reapply for tenure during the 2010-2011 academic year, despite that her tenure application the year before had been allowed to proceed to the University President's review without first being withdrawn. However, any such allowance of repetition of application, (after denial), would have been extraordinary, and contrary to administrative practice. The testimony of multiple witnesses confirms that once an application for tenure moves up out of the department and through the administration, if the portfolio is not withdrawn <u>*prior to denial*</u> by the President then the professor cannot reapply. For example, former interim-president and vice-president for academic affairs, Dr. Jesse Snowden, testified in pertinent part, as follows:

> Q. At Southeastern while you were interim president, could the candidate apply in the fifth year, get denied by the president, and the reapply in their sixth year?
> A. No.
> Q. Why not?
> A. One – the policy, once you went through the process, that was it. You were either granted tenure or not.
> Q. Was that also true when you were vice-president for academic affairs?
> A. Yes.
> …
> A. I don't know of any university that allows you to apply again after you've been denied tenure.

(Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2).

In another instance, former vice-president for academic affairs, Dr. Douglas McMillan, testified in pertinent part, as follows:

> Q. And is it your understanding that this policy prohibited reapplication for tenure after denial by the president?
> A. Yes.

(Ex. 6 at p. 189, ln. 21-24).

To the extent Intervenor was not allowed to reapply after she ignored University leadership's advice, but instead let her tenure portfolio and application go all the way up through the administration knowing it would be denied, Intervenor neither engaged in protected activity nor suffered an adverse employment action. She made a choice, and that choice had consequences. She was treated no less fairly than anyone else. Summary judgment in favor of RUSO and SEOSU should be granted.

CONCLUSION

Intervenor does not belong to a class protected under Title VII. Intervenor has not produced reliable evidence of unlawful treatment by SEOSU or RUSO, because such evidence does not exist. Defendants have produced legitimate, nondiscriminatory reasons for their decisions and actions, and those determinations were even corroborated by Intervenor's employment (and search therefore) after her departure from SEOSU. Intervenor has not shown that Defendants' reasons were pretextual because there is no evidence of pretext. Tenure is a significant commitment of time and taxpayers' resources, and it is not to be given lightly. Intervenor was not unlawfully discriminated against or subjected to a hostile work environment; she merely failed to meet the requirements for attainment of tenure. Summary judgment should be granted in favor of the Regional University System of Oklahoma and Southeastern Oklahoma State University.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2017, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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