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

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

PLAINTIFF DR. RACHEL TUDOR'S PRELIMINARY RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, NEW TRIAL

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INTRODUCTION

Out of an abundance of caution, Dr. Tudor files this Preliminary Response [1] in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict, Or, in the Alternative, New Trial (ECF No. 316) ("Motion"). For the reasons articulated in Tudor's July 18, 2018 Motion to Strike (ECF No. 318), Defendants' Motion is inexcusably untimely and should be struck.

In the event Defendants' Motion is not struck, Tudor believes it can and should be denied on the merits. Grant of renewed judgment as a matter of law is not warranted because Defendants did not preserve the arguments raised in their Motion through a proper Rule 50(a) motion at trial and, even if they had, Defendants failed to carry their hefty burden to demonstrate the presumptively valid jury verdict must be vacated. Similarly, grant of a new trial is not warranted because Defendants failed to properly object to the issues they now complain of at trial and, even if they had, Defendants fail to demonstrate entitlement to the relief sought.

[1] On July 25, 2018 the Court entered an Order (ECF No. 323) directing Defendants to respond to Tudor's pending Motion for Extension of Time (ECF No. 322) to Respond to Defendant's Motion for Judgment as a Matter of Law, Or In the Alternative, New Trial (ECF No. 316). Because the Court's Order did not expressly permit Tudor to file her Response at a later date and because Local Rule 7.1(g) permits the Court in its discretion to treat motions for which a response is not filed within 21 days without leave of Court to be deemed confessed, the undersigned quickly drafted this Response in the 24-hours following the issuance of the Court's July 25 Order. In the event that Tudor's Motion to Strike (ECF No. 318) is not granted, Tudor requests leave to amend this Brief as necessary.

ARGUMENT AND AUTHORITIES

I. RENEWED JUDGMENT AS A MATTER OF LAW UNWARRANTED

A. Legal Standard

50(b) arguments must be preserved through 50(a) motion. "Only questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict." *Perry v. Amtrak*, 2013 WL 12071665 at *4 (W.D.Okla. 2013) (*quoting Dow v. Chemical Corp. v. Weevil-Cide Co., Inc.*, 897 F.2d 481, 486 (10th Cir. 1990)). "A party may not circumvent 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict." *United Inter. Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000). The "specific grounds" requirement of 50(a) demands that a party must identify issues with specificity to preserve them for 50(b) purposes. "Merely moving for directed verdict is not sufficient to preserve any and all issues that could have been, but were not raised in the directed verdict motion." *Id.* at 1229. Moreover, "[i]n view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict to enter JMOL on grounds not raised in the pre-verdict JMOL." *Wald v. Mudhopper Oilfield Servs., Inc.*, 2006 WL 2128835 at *5 (W.D.Okla. July 27, 2006) (Cauthron, J.) (cleaned up).

High bar for setting aside jury verdict. "[S]ince grant of [a motion for

judgment notwithstanding the verdict] deprives the nonmoving party of a determination of the facts by a jury, [it] should be cautiously and sparingly granted." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir. 1981). This Court cannot weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *Id.* at 680 n.2. Overturning a jury's verdict is permissible only when the evidence points but one way and is susceptible to no reasonable inferences sustaining the position of the nonmovant. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988). Lastly, all evidence and inferences must be construed in the favor of the non-movant. *Bruno v. Western Elec. Co.*, 829 F.2d 957, 962 (10th Cir. 1987) (*quoting EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985)).

Sufficiency of evidence burden. The jury verdict must be "supported by substantial evidence when the record is viewed most favorably to the prevailing party." *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002). Sufficient evidence can mean "something less than the weight of the evidence," and consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by evidence." *Id.* (*quoting Beck v. N. Natural Gas Co.*, 170 F.3d 1018, 1022 (10th Cir. 1999)). Moreover, "the mere existence of contrary evidence does not itself undermine the jury's

findings as long as sufficient evidence supports the findings." *Webco*, 278 F.3d at 1128. A Rule 50(b) motion should be granted only "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1112 (10th Cir. 2004) (cleaned up).

B. Failure to Preserve

Defendants' 50(b) motion can and should be denied for the simple fact that none of the arguments raised in it were preserved in a 50(a) motion, as is required. At trial, Defendants proffered only an oral 50(a) motion on the record, arguing cryptically and without requisite specificity: "We believe the facts in evidence support a motion for directed verdict on each of plaintiff's claims." ECF No. 266, 724:18–25. This preserves nothing.

A 50(a) motion must "specify the judgment sought and the law and facts on which the moving party is entitled to judgment." Fed.R.Civ.P. 50(a)(2). Defendants' 50(a) motion did not identify any, and thus failed to preserve, legal issues for a subsequent 50(b) motion, even those arguments Defendants previously raised at summary judgment. *Wolfgang v. Mid-Am. Motorsports*, 111 F.3d 1515, 1521–22 (10th Cir. 1997). Though Defendants' 50(a) motion proffered that "facts in evidence" supported a verdict in their favor, that statement is so cryptic and vague that it fails the "specific grounds" test. To wit, Defendants did not identify which "facts in evidence"

supported their position or explain how construed such facts entitled them to judgment. Defendants cannot use such a vague statement to buttress a 50(b) motion since it does not apprise Tudor or the Court of the "specific grounds" purportedly entitling them to a directed verdict. *See Wharf*, 210 F.3d at 1229.

C. *Etsitty* Arguments

Despite past admonishments from this Court that Defendants cease arguing that Tudor is not a member of a protected class, Defendants revive that argument in their Motion. *Compare* Motion at 3–6 *with* Order Denying SJ, ECF No. 219 at 6 ("Defendants again revisit their argument that Plaintiff is not entitled to protected status. That argument warrants no further discussion.").

This Court already decided that Tudor is a member of a protected class, which is law of this case. "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (*citing Arizona v. California*, 460 U.S. 605, 618 (1982) (cleaned up). *See also United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) ("Under law of the case doctrine, findings made at one point during the litigation become law of the case for subsequent stages of the same litigation."). Defendants fail to argue why law of the case doctrine should be set aside and thus their arguments are unavailing.

Moreover, even if this Court were to entertain Defendants' arguments, Defendants identify no error of law pursuant to *Etsitty v. Utah Transit Auth.*, 502 F.3d 1213 (10th Cir. 2007) which entitles them to renewed judgment as a matter of law.[2]

D. Sufficiency of Evidence

Sufficiency generally. Defendants repeatedly delve into the warring

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[2] Defendants quote fleeting comments made by counsel and witnesses at trial, arguing that the mere use of the word "transgender" is fatal under *Etsitty*. But *Estitty* did not address statements at jury trials let alone hold that use of the word transgender is fatal. In fact, *Etsitty* implies the opposite—"an individual's status as a transsexual should be irrelevant to the availability of Title VII protection." *Etsitty*, 502 F.3d at 1222. Moreover, Defendants' contention that Tudor "put on a transgender identity" case rather than a sex discrimination case is equally nonsensical. The jury was instructed that liability for Tudor's two sex discrimination claims could only be found if there was evidence showing she experienced discrimination because of her gender or failure to conform with gender stereotypes (ECF No. 257 at 10–11). It must be assumed that the jury followed the instructions. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir. 1978) (*citing United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973)).

Defendants also raise a slew of arguments which they claim show either that Title VII cannot protect transgender persons from sex discrimination or that the trial itself was forbidden by *Etsitty*. Both contentions are unsound. As to the contention that the United States government does not believe transgender persons are within the protective ambit of Title VII—that is utterly ridiculous. The United States settled their portion of Tudor's case on the merits in August 2017 (ECF No. 268-3), best evidence of the government's true position. Regardless, this Court's duty is to independently interpret the law, not acquiesce to the position of the current federal administration. Additionally, Defendants' reliance upon *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984) is misplaced (Mot. at 6 n.2). The Seventh Circuit recognizes that the very language Defendants lift from *dicta* in *Ulane* is wholly abrogated by the Supreme Court's intervening decisions, including *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1998) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1042–49 (7th Cir. 2017). This Court must abide by *Etsitty*. But, if the Court desires to follow the Seventh Circuit instead, then it should follow that Circuit's holding that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048

Lastly, Defendants' argument that *Etsitty* forecloses protection for transgender persons because they are not properly considered biologically "male or female" is totally foreclosed. At the November 1, 2017 hearing, Defendants stipulated that in exchange for Dr. Brown—Tudor's expert on sex—not testifying at trial, they would cease raising arguments questioning the meaning of "sex." *See* ECF No. 225 at 7 ("[W]e do not intend to dispute the definition of sex"). Moreover, the *Etsitty* Court held that construction of Title VII must be guided by the "plain language of the statute" and, if appropriate evidence about the nature of sex is presented reflecting its "plain meaning" encompasses something more than assumed in 2007 without the aid of scientific evidence on point, then *per se* protection might be found. *Etsitty*, 502 F.3d at 1222 ("Scientific research may someday cause a shift in the plain meaning of the term 'sex'."). It is Tudor's position that Dr. Brown's report (ECF No.205-1) is uncontroverted scientific evidence showing the plain meaning of sex has shifted.

evidence and claim that, because evidence was presented in support of both Tudor's and Defendants' theories of the case, Tudor must have presented insufficient evidence. Not so. Tudor need not confine her evidence to Defendants' view of the case in order to prevail at trial let alone for the verdict to survive a sufficiency challenge. *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1422 (10th Cir. 1991). Tudor was free to present evidence in support of her merits case that conflicted with Defendants' evidence or simply prove essential facts, like pretext, by alternative means. *Id.*

Moreover, where there is conflicting evidence on a particular issue, the jury is free to decide what weight should be given. Thus, where fact witnesses provide conflicting accounts, the jury is entrusted to make credibility decisions. *United States v. Cardinas Garcia*, 596 F.3d 788, 794 (10th Cir. 2010) ("We accept at face value the jury's credibility determinations and its balancing of conflicting evidence."). Moreover, it does not follow that conflicting evidence which the jury must make credibility decisions on proves insufficiency of evidence—weighing sharply conflicting evidence is simply what juries do. *See Schmidt v. Medicalodges, Inc.*, 350 Fed.Appx. 235, 240 (10th Cir. 2009) (jury findings on "sharply conflicting evidence" conclusively binding and not against the weight of evidence).

Lastly, Defendants must do more than lodge piecemeal attacks on discrete evidence to carry their burden. "[I]ndividual pieces of evidence,

insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987).

Tudor's qualifications. Defendants' contention that Tudor failed to present sufficient evidence of her qualifications for tenure in the 2009-10 cycle is preposterous (Motion at 7–8).

As Defendants acknowledge, different witnesses at trial articulated slightly different understandings of the standard for tenure at Southeastern during the pertinent period. That admission is dispositive here. The jury need not accept Defendants' witnesses stated qualifications where there is evidence that different qualifications existed and/or were applied to other similarly situated applicants. *York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 945 (10th Cir. 1996). Additionally, the jury is "free to consider the employer's subjective hiring or promotion criteria in the mix of plaintiff's circumstantial evidence of discrimination, but it not required to accept the employer's version of its motivation." *Cortez v. Wal-Mart Stores, Inc.*, 460 F.3d 1268, 1274 (10th Cir. 2006). Thus, Parker's testimony revealing how Tudor's denial could not be reconciled with tenure granted to comparators (see, e.g., ECF No. 263 at 266–73), Cotter-Lynch's testimony regarding the same (see, e.g., *id.* at 319–21), or testimony from others claiming Tudor met the pertinent qualifications is sufficient to foreclose this issue.

Defendants' related contention that Tudor did not show she met the minimum qualifications for tenure is also infirm. To sustain the verdict, Tudor must only have proffered evidence that she does not suffer from "an absolute or relative lack of qualifications" not that she "is able to meet all the objective criteria adopted by the employer." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193–94 (10th Cir. 2000). *See also Edwards v. Okla.*, 2017 WL 401259, at *2 (W.D.Okla. 2017) (Cauthron, J.) (*quoting EEOC v. Horizon/CMS*, 220 F.3d at 1193 ("relevant inquiry at the prima facie stage is not whether an employee is able to meet all the objective criteria adopted by the employer, but whether the employee has introduced some evidence that she possesses the objective qualifications necessary to perform the job sought")).

Tudor made at least the minimal showing. She testified to her understanding of the qualifications in the 2009-10 cycle (ECF No. 246 at 50–52; *id.* at 55–56; *id.* at 74–78). Dr. Parker did the same and explained in detail why Tudor met those qualifications (ECF No. 263 at 227–74). Drs. Spencer (see, e.g., ECF No. 264 at 441–42) and Mischo (see, e.g., *id.* at 390), both of whom reviewed Tudor's 2009-10 portfolio, testified they believed at the time that Tudor met the standard for tenure. Dr. Cotter-Lynch did the same as well (see, e.g., ECF No. 263 at 320–21). Though Defendants dispute the weight one might give to Tudor's evidence as opposed to their evidence—

it is plain that Tudor met the requirement of presenting some evidence of her qualifications.

Pretext in 2009-10 cycle. Defendants' contention that Tudor failed to present any evidence of pretext relating to her discrimination claim for the 2009-10 cycle fails on its face. Among other things, Tudor and others testified at length about procedural irregularities in Tudor's 2009-10 tenure application experience—that alone is sufficient to support a finding of pretext. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (examples of pretext include, "prior treatment of plaintiff," "disturbing procedural irregularities (e.g., falsifying or manipulating . . . criteria); and the use of subjective criteria.")). As another example, Tudor and others also testified about subjective criteria—as one example, subjective judgments concerning the application cover letter wholly apart from qualifications in the areas of teaching, scholarship, and service—which Defendants' own witnesses claimed played a part in their decision on the 2009-10 portfolio. *See, e.g.*, ECF No. 265 at 607–09 (Scoufos testimony). That, too, is sufficient evidence of pretext. *Garrett*, 305 F.3d at 1217.

Missing Minks. Similarly, Defendants' argument that there was a total absence of pretext evidence because, they claim, no evidence of President Minks' sex stereotyping was produced at trial is also misguided (Mot. at 12–13). Defendants fundamentally misapprehend sex stereotype doctrine. Sex

stereotype is a means of explaining both the broad scope of Title VII's status coverage (see, e.g., *Oncale v. Sundowner Offshore Sers., Inc.*, 523 U.S. 75 (1998)) as well as a form of proof that a plaintiff may—but is not required to—proffer in support of her claim of discrete act discrimination (see, e.g., *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989)). As to the latter, while stereotyped remarks from the mouth of a bad actor "can certainly be evidence that gender played a part," such evidence is not required. *PriceWaterhouse*, 490 U.S. at 251–52. Where, as is the situation here, the employer proffers a facially nondiscriminatory rationale for the adverse action, the employee can prove discrimination by showing "the proffered reason is a pretext for illegal discrimination." *Roberts v. State of Okla.*, 110 F.3d 74, 1997 WL 163524 at *5 (10th Cir. 1997).

Tudor did what was required—she proffered evidence of pretext. As one example, the April 30, 2010 McMillan Letter (attached hereto as **Exhibit 1**; marked at trial as Tudor Ex. 79) purports to set forth Mink's rationales for denial as parroted by McMillan. The jury plainly could have seen the bizarre procedural irregularities and logical infirmities in that letter as evidencing pretext attributable to Minks.

Lastly, if Defendants are so certain that Minks could himself explain why he did not harbor bias and/or why his rationales for denial were not pretextual, he should have testified at trial. Tellingly, Defendants chose not

to put Minks on the stand. That strategic choice can neither bar liability nor give rise to a right for a new trial. *See, e.g.*, *Toliver v. New York City Dep't of Corr's*, 202 F.Supp.3d 328, 341 (S.D.N.Y. 2016) (strategic and/or tactical errors of party's own counsel do not rise to level of threatening miscarriage of justice or erroneous outcome meriting new trial).

Pretext in 2010-11 cycle. Defendants make similarly disingenuous arguments purporting that Tudor failed to present any evidence of pretext relating to her discrimination claim for the 2010-11 cycle. Defendants claim there was no discrimination in the 2010-11 cycle because Southeastern's rules prohibited reapplication. Yet, Tudor presented evidence showing that was simply not true. Among other things, she introduced into evidence emails between April 2010 emails between Scoufos, McMillan, Minks, counsel, and Charles Weiner attesting to their collective understanding that the rules permitted Tudor to reapply in the 2010-11 cycle (attached hereto as **Exhibit 2**; marked at trial as Tudor Ex. 35). That alone is sufficient to show pretext since it is plain the actors in question did not always believe reapplication was barred despite saying otherwise after the fact. *See, e.g.*, *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003) (pretext established by pointing to "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"); *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010) (pretext established with "evidence that the employer didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda").

Evidence of retaliation in 2010-11 cycle. Defendants' contention that Tudor did not present evidence supporting her retaliation claim at trial totally lacks merit. As a threshold matter, Defendants' argument that Tudor has no retaliation claim because she is not a member of a protected class is infirm for the reasons explained *supra* Argument Part I-C.

Moreover, Defendants misapprehend what conduct is prohibited as retaliation. It states,

> It shall be unlawful employment practice for an employer to discriminate against any of its employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter [Opposition Clause], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [Participation Clause].

42 U.S.C. § 2000e-3(a). By its terms, Title VII does not limit protection for opposition. *Bd. of Cnty. Comm'rs v. EEOC*, 405 F.3d 840, 852 (10th Cir. 2005) (explaining Title VII "empowers employees to report what they reasonably believe is discriminatory conduct without fear of reprisal"). Thus, once Tudor filed good faith complaints with the EEOC and at Southeastern—which happened in Fall 2010 prior and close in time to Defendants' decision to

prohibit her tenure reapplication—any retaliation against Tudor for opposing what she believed to be acts in violation of Title VII gave rise to a claim for retaliation. *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004) ("[p]rotected opposition can range from filing formal charges to voicing informal complaints to superiors"); *id.* at 1016 (employee need only show "[s]he had a reasonable good-faith belief that the opposed behavior was discriminatory"). Thus, even if Tudor is not a member of a protected class—which would be contrary to *Etsitty*—Tudor can still state a valid claim for retaliation. *See, e.g.*, *Hertz*, 370 F.3d at 1015–16 (employee not required to "convince the jury that [her] employer … actually discriminated against [her]" for retaliation claim to be viable); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (employee's complaint of discrimination is protected opposition even if it is mistaken, so long as the belief that discrimination occurred was objectively reasonable and made in good faith).

Lastly, the assertion that Defendants could not have retaliated against Tudor because once tenure was denied in the 2009-10 cycle she could not apply again was disputed at trial with evidence showing just the opposite. For example, Dr. Prus testified that reapplication was possible, he had in fact restarted the tenure process for Tudor in Fall 2010, and he thought she merited tenure that year (ECF No. 264 at 482–86). Additionally, the April 2010 email (**Exhibit 2**) between administrators evidences that they believed

then that the rules permitted Tudor to reapply in the 2010-11 cycle, undercutting Defendants' proffered rationale that they always believed reapplication was prohibited. Of course, McMillan's October 2010 letter to Tudor (attached hereto as **Exhibit 3**; marked at trial as Tudor Ex. 84), similarly highlighting that reapplication is not *per se* prohibited by the rules, is also probative of pretext.

II. NEW TRIAL UNWARRANTED

A. Legal Standard

Comments by counsel at trial. A movant seeking new trial on the premise that opposing counsel made prejudicial comments to the jury carries a hefty burden. First and foremost, the movant must show they timely objected to those same purportedly prejudicial comments at trial. "A party who waits until the jury returns an unfavorable verdict to complain about improper comments during opening statement and closing argument is bound by that risky decision and should not be granted relief." *Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1465 (10th Cir. 1994). "[C]ounsel [] cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238–29 (1940). Second, if the alleged comments were fleeting at best, there is an inference that they are not prejudicial. *EEOC v. Jetstream Ground Servs.,*

Inc., 2017 WL 8201623, at *8 (D.Colo. Nov. 3, 2016) (*citing Stouffer v. Trammell*, 738 F.3d 1205, 1225 (10th Cir. 2013) (declining to find prejudice in part because the challenged comments were brief)).

Admission of evidence. Evidentiary rulings are committed to the "very broad discretion" of the trial court. *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998), *cert denied* 526 U.S. 1018 (1999). An evidentiary ruling is an abuse of discretion only if based on "an erroneous conclusion of law, a clearly erroneous finding of fact, or a manifest error in judgment." *Id.* Even if an evidentiary ruling is an abuse of discretion, a new trial is still inappropriate unless the error prejudicially affected the movant's "substantial rights." *Id.* Moreover, "[e]vidence admitted in error can only be prejudicial if it can be reasonably concluded that with or without such evidence, there would have been a contrary result." *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998). Ultimately, "the burden of demonstrating that substantial rights were affected rests with the party asserting error." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995).

Sufficiency of evidence. "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." *Anaeme v. Diagnostek, Inc.,* 164 F.3d 1275, 1284 (10th Cir.) (cleaned up), *cert. denied,* 528 U.S. 814, 120 S.Ct. 50, 145 L.Ed.2d 44 (1999). Evidence

must be considered in the light most favorable to the prevailing party, bearing in mind that "the jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact." *Snyder v. City of Moab*, 354 F.3d 1179, 1188 (10th Cir. 2003) (*quoting United Phosphorous Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir. 2000)) (cleaned up).

B. Sufficiency of Evidence

Defendants raise one new argument in support of their contention that evidence was so insufficient that a new trial is warranted—they argue that Tudor's 2009-10 cycle cover letter was poor and thus it would have been appropriate for tenure to be denied on the basis alone (Motion at 22). But that argument gets them nowhere. None of Defendants witnesses claimed that Tudor was denied tenure solely because of her cover letter. Indeed, they testified to the opposite at trial. *See, e.g.*, ECF No. 265 at 599–600 (Scoufos testimony on factoring in recommendation letters even though not required qualification). And, if they had claimed as much, that would be such a suspicious subjective criteria that it would itself serve as ample evidence of pretext. *See Garrett* , 305 F.3d at 1217.

C. Belated Objections to Fleeting Comments

Defendants put McMillan's religion into issue. Defendants' claim of

prejudice is infirm because the record reflects that it was Defendants—not Tudor—whom placed Dr. McMillan's religion into issue. Thus, any prejudice incurred was at Defendants' own hands and is no grounds for a new trial.

At trial, Mindy House made a fleeting comment concerning the undisputed fact that Dr. McMillan made an employment decision premised upon his religious beliefs, which she in turn found concerning (ECF No. 264 at 511). Defendants admit that they were spooked, so they both cross-examined House on that comment at length *and* tailored McMillan's direct testimony so as to exhaustively explore the same (Mot. at 22–23). The fact that Tudor's counsel made a passing comment in closing about McMillan's credibility based upon his direct testimony at trial—nearly all of which focused on his religious convictions—is unsurprising and most certainly not prejudice giving rise to a new trial. Tellingly, Defendants cite no precedent for the proposition that mere mention of a person's having (or not having) religious beliefs is grounds to warrant a new trial.

Defendants' true complaint seems to be that they now believe they made a fatal strategy decision when they elected to draw more attention to McMillan's religious beliefs at trial. But, even if Defendants' strategy choice was fatal, their failure to raise their concerns at trial rather than engaging in what they contend was harmful self-help cannot give way to a new trial. *Toliver*, 202 F.Supp.3d at 341.

Masterpiece Cake *explained.* Defendants' contention that the Supreme Court's recent decision in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) mandates a new trial is wholly specious. Indeed, Defendants fundamentally misunderstand the crux of *Masterpiece* let alone its proper application to this case.

Masterpiece holds that state actors cannot endorse (or counter-endorse) particular religious beliefs in the course of administering civil rights laws.[3] 138 S.Ct. at 1732. Put another way, *Masterpiece* proscribes the conduct of state actors, not private citizens like Tudor and her counsel. *Id.* at 1733 (Kagan, J. concurring) (clarifying state actor lynch-pin of majority decision). Thus, Defendants' contention that *Masterpiece* commands a new trial because one witness, Ms. House, mentioned the religion of Dr. McMillan in passing during direct testimony and Tudor's counsel—himself a devout Catholic[4]—made a passing comment about McMillan's overarching credibility

[3] In summary, *Masterpiece* involved a private citizen's challenge to an administrative penalty imposed by a government commission tasked with enforcing state nondiscrimination laws. The citizen, a devout Christian whom owned and operated a bakery open to the public at large, refused to sell wedding cakes to gay couples. The Commission found the baker in violation of a state law expressly forbidding such practices. Though myriad points of purported error were raised to the Supreme Court, it ultimately decided the case narrowly, holding that the Commission's members' ultimate merits decision was tainted by anti-religious bias as evidenced by on the record comments from one commissioner comparing the baker's religious refusal to the conduct of Nazis.

[4] The undersigned attests that the religious views of counsel (or lack thereof) have no relevance to these proceedings. However, Defendants' Motion endeavors to paint the undersigned as harboring bigotry for persons of faith, which is patently offensive given his own faith. Indeed, the undersigned is outspoken about his faith and its relation to his work as a civil rights lawyer representing transgender persons. *See, e.g.*, Marcus Patrick Ellsworth, "Who Is My Neighbor: Some Catholics Fight for Trans Rights Even When the Church Won't," MTVNews.com (Sept. 7, 2016), http://www.mtv.com/news/2929013/who-is-my-neighbor/ ("There's a tendency to see a strict divide between people who have religious beliefs, whatever those might be, and people who are trans. […]

is simply unfounded. The evil that so concerned the Supreme Court in *Masterpiece* was that state actors whom adjudicate cases were impermissibly biased against a party because of his religious beliefs, thereby depriving the citizen of a fair hearing. 138 S.Ct. at 1729. In the case at bar, the jury was the ultimate decision-maker. Defendants have pointed to no evidence showing the jury itself harbored anti-religious bias let alone that that was determinative of the outcome, thus retrial is not warranted.

Moreover, *Masterpiece* suggests that Defendants created impermissible prejudice for Tudor. Under *Masterpiece*, state actors, in the course of civil rights proceedings like this one, are absolutely barred from expressing an opinion for or against a particular religious viewpoint because the power of the State cannot be used to endorse or counter-endorse particular views. It is undisputed that Defendants' counsel—the Oklahoma Attorneys General Office—and Defendants themselves are state actors. Thus, under *Masterpiece*, it was inappropriate for Defendants to affirmatively introduce evidence of McMillan's religious point of view in a manner that communicated to the jury a State preference for those viewpoints.

D. Parker Testimony

Defendants' argument that a new trial is necessary because Dr.

There are many trans people, myself included, who are deeply religious. I'm an observant, practicing Roman Catholic. It's not appropriate to say it's Catholics versus trans people or any other particular group of believers.").

Parker's testimony should not have been admitted at trial is also patently infirm. As a threshold matter, Defendants did seek to exclude Parker's testimony via a *Daubert* motion before trial (ECF No. 96) which was denied on the merits by this Court (ECF No. 163). But at trial, Defendants neither objected to Parker taking the stand *nor* admission of Parker's expert report.[5] Thus, Defendants waived any claim of prejudice as to Parker's testimony and his report. *McEwen v. City of Norman, Okla.*, 926 F.2d 1539, 1544 (10th Cir. 1991) ("A party whose motion in limine has been overruled must nevertheless object when the error he sought to prevent by his motion occurs at trial."). Similarly, Defendants failed to seek leave to *voir dire* Parker out of the ear shot of the jury so as to establish limits on his testimony they now claim resulted in prejudice—that failure also constitutes waiver. *See United States v. Gomez*, 67 F.3d 1515, 1526 (10th Cir. 1995).

Additionally, even if admission of Parker's testimony was erroneous, Defendants fail to prove it was sufficiently prejudicial as to warrant grant of a new trial. Typically, improper admission of expert testimony is deemed harmless error, which is insufficient grounds on which to grant a new trial. *See Kinser v. Gehl Co.*, 184 F.3d 1259, 1271 (10th Cir. 1999). To demonstrate that the error was greater than harmless, Defendants bear the burden of

[5] *See* ECF No. 263 at 212 (showing Plaintiff counsel naming Parker as next witness and Defendants not objecting to his taking stand); *id.* at 243 (The Court: "Do you have an objection to the report?" Mr. Joseph: "We don't have an objection to that admission, Your Honor, no.").

showing that the admission of Parker's testimony was dispositive of the ultimate verdict. *Lillie v. U.S.*, 935 F.2d 1188, 1192 (10th Cir. 1992).

Defendants' main gripes with Parker's trial testimony is that, in their minds, it is *possible* that the jury could have given more weight to Defendants' witnesses and/or theory of the case if Parker had not testified. But that argument falls short of Defendants' hefty burden. The jury could have returned a verdict in Tudor's favor based upon other evidence at trial—such as the testimony of Tudor, Cotter-Lynch, Weiner, Mischo, Spencer, or others. Since Parker's testimony was one of many pieces of evidence, its admission did not foreclose the jury from considering Defendants' alternative theory or evidence, and its admission was at most harmless error which is insufficient to warrant a new trial.

E. Purported "Handicaps"

Defendants also argue that a collection of events left Defendants "handicapped throughout trial," and thus a new trial is merited. Among other things, they argue they (1) did not receive marked trial exhibits and witness subpoenas until "the literal last second" (Mot. at 24); (2) one day of trial transcripts was briefly released online (*id.*); and (3) Tudor "essentially refused to answer questions on the stand" (*id.*). Defendants contend, without explanation, that failure to grant a new trial under those circumstances, stands to threaten the "integrity of the jury system itself." *Id.* at 25 (*quoting*

Tidewater Oil Co. v. Waller, 302 F.2d 638, 643 (10th Cir. 1962)).

But in order to merit a new trial, Defendants must demonstrate that they were fundamentally prejudiced by errors. New trials should not be ordered simply because things did not go a movant's way or there were minor mishaps. *Maul v. Logan Cnty. Bd. of Cnty. Com'rs*, 2006 WL 3447629, at *1 (W.D.Okla. Nov. 29, 2006) (Cauthron, J.) (Rule 59 not intended to offer a "second bite at the proverbial apple"). Defendants' argument fails because the issues they cling to did not in fact result in prejudice. *Ryder v. City of Topeka*, 814 F.2d 1412, 1425 (10th Cir. 1987) ("A showing of prejudice, however, is essential. A new trial is not to be granted simply as a punitive measure.") (cleaned up).

(1) As to trial exhibits, Defendants fail to mind their duty of candor by reminding this Court that later on in the trial the Court itself acknowledged that Defendants' argument about improperly labeled exhibits prejudicing them was infirm. That was so because Tudor provided Defendants with exhibits both marked with the case number on each page *and* in clearly labeled binders with numbered dividers by exhibit which were sufficient enough for the Court itself to follow along with exhibits as they were introduced at trial. *See* ECF No.263 at 202–04. As to trial subpoenas, Defendants' counsel can hardly claim surprise or disadvantage in this case. Tudor docketed the subpoenas on November 6, 2018, prior to them being

served. Thus, Defendants were apprised well ahead of time of the persons Tudor sought to testify, the days on which she desired them to be called, and had ample opportunity to quash the subpoenas if needed. Indeed, Defendants tried to quash several subpoenas, even for persons they did not represent though they claimed they did. *See, e.g.*, ECF No. 265 at 559 (Tudor's counsel raising issue to Court).

(2) As to mistaken release of one day of trial transcripts during the pendency of trial—that error was quickly fixed by Tudor's counsel upon notice of the issue (see, e.g., ECF No. 265 at 556–57). Moreover, Defendants do carry the burden of showing that that mishap prejudiced them, as is required. *Ryder*, 814 F.2d at 1425.

(3) As to Defendants' claimed concerns regarding Tudor's ability to directly answer a handful of questions on cross-examination on the first day of trial—Defendants do not cite any authority for the proposition that this is prejudice giving rise to a new trial. Moreover, Defendants fail to point with particularity to specific questions asked of Tudor that she did not answer which caused them prejudice, as is required. *Ryder*, 814 F.2d at 1425.

F. Remittitur

Defendants also seek a new trial on the premise that the jury's verdict should be remitted or a new trial granted (Mot. at 28–29). That argument fails on its face because the Court already considered Defendants' sufficiency

of evidence argument for remittitur and denied it. *See* ECF No. 292 at 5 ("Defendants' arguments for further reduction are rejected, as they lack sufficient evidentiary or legal support."). Under the law of the case doctrine, Defendants must present some new evidence or argument supporting disturbing this Court's prior decision on remittitur—their failure to do so means their request should be summarily denied. *Monsisvais*, 946 F.2d at 1115; *Webb*, 98 F.3d at 587. Moreover, Defendants' request fails because they present no argument, evidence, or case law in support of the contention that a jury verdict of $300,000 is excessive in this matter. Lastly, binding precedent bars this Court from remitting the jury's award below the $300,000 maximum cap threshold. *See Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

CONCLUSION

For the reasons articulated in Dr. Tudor's Motion to Strike (ECF No. 318), Tudor respectfully requests that the Court strike Defendants' Motion for Judgment Notwithstanding the Verdict, Or, in the Alternative, New Trial (ECF No. 316) as sanction for it being inexcusably untimely. In the event that Tudor's Motion to Strike is not granted, she alternatively requests that Defendants' Motion be denied on the merits for the reasons articulated above.

Dated: July 26, 2018

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 11211
P: 949-291-3185
F: 917-398-1849
ezraiyoung@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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