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

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

**PLAINTIFF DR. RACHEL TUDOR'S**
**MOTION AND INCORPORATED BRIEF IN SUPPORT OF**
**RECONSIDERATION OF REINSTATEMENT**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

PREAMBLE.....1

I. FINDINGS OF FACT INCONSISTENT WITH THE RECORD.....1

II. CONFLICTS WITH BINDING PRECEDENT.....16

III. EQUITABLE CONSIDERATIONS.....21

IV. CHANGE IN CIRCUMSTANCES.....25

## TABLE OF AUTHORITIES

### Cases

*Abuan v. Level 3 Communications, Inc.*,
353 F.3d 1158 (10th Cir. 2003).....16

*Bingman v. Napkin & Co.*,
937 F.2d 553 (10th Cir. 1991).....16, 17

*Burlington Industries, Inc. v. Ellerth*,
524 U.S. 742 (1998).....23

*Brown-Crummer Inv. Co. v. City of Purcell*,
128 F.2d 400 (10th Cir. 1942).....23

*Eastman v. Union Pacific R. Co.*,
493 F.3d 1151 (10th Cir. 2007).....22

*EEOC v. Prudential Assoc.*,
763 F.2d 1166 (10th Cir. 1985).....18, 19

*Fitzgerald v. Sirloin Stockade, Inc.*,
624 F.2d 945 (10th Cir. 1980).....19

*Ford Motor Co. v. EEOC*,
458 U.S. 219 (1982).....22

*Green v. Biddle*,
21 U.S. 1 (1823).....24

*Jackson v. City of Albuquerque,*
890 F.2d 225 (10th Cir. 1989).....17, 21, 24

*James v. Sears, Roebuck and Co., Inc.*,
21 F.3d 989 (10th Cir. 1994).....16

*Marshall v. TRW, Inc. Reda Pump. Div.*,
900 F.2d 1517 (10th Cir. 1990).....18

*McKennon v. Nashville Banner Pub. Co.*,
513 U.S. 352 (1995)……21

*Medlock v. Ortho Biotech, Inc.*,
164 F.3d 545 (10th Cir. 1999)……20

*New Hampshire v. Maine*,
532 U.S. 742 (2001)……22

*Owens v. Continental Supply Co.*,
71 F.2d 862 (10th Cir. 1934)……24

*Reeves v. Claiborne Cnty. Bd. of Educ.*,
828 F.2d 1096 (5th Cir. 1987)……21

*Spulark v. K Mart Corp.*,
894 F.2d 1150 (10th Cir. 1990)……...19

*Thornton v. Kaplan*,
961 F.Supp. 1433 (D.Colo. 1996)……..…18

*Tidewater v. Dobson*,
195 Or 533, 577 (Or. 1952)……..…23

**Rules**

Fed. R. Civ. P. 60(b)……1

Local Rule 78.1……1

Dr. Tudor respectfully requests reconsideration of the January 29, 2018 Opinion (ECF No. 275) pursuant to Fed. R. Civ. P. 60(b). Dr. Tudor also respectfully requests that the Court hear oral argument on this motion as permitted by Local Rule 78.1. Oral argument in this case of national importance will illuminate the positions of the parties, assist the Court in assessing the fact record, as well as shed greater light on the equities.

***Preamble***

From the very beginning, Dr. Tudor's case has been about one thing—returning to Southeastern with the tenured position she earned. For years Tudor has held on, knowing that her only path back to Southeastern is through this Court's intervention.

Dr. Tudor humbly requests that the Court reconsider its Opinion for four reasons. First, there are core factual findings which are not supported by the record. Second, there are holdings of law which conflict with binding precedent. Third, there are equitable considerations which warrant reassessing the propriety of reinstatement under the very specific circumstances of this case. Fourth, there are changes in circumstance evidencing Tudor's scholarly productivity.

## I. FINDINGS OF FACT INCONSISTENT WITH THE RECORD

Dr. Tudor respectfully points to the following core findings of fact undergirding the Opinion which are inconsistent with the record.

A. There are no hostilities.

***Jury's verdict precludes finding of hostilities.*** In good faith, Tudor brought a hostile work environment claim and presented evidence in support at trial. As the finder of fact, the jury ultimately sided with Defendants, resolving that there is insufficient evidence of hostilities. *See* ECF No. 262 (answering in the negative to the question "Has Plaintiff proven by a preponderance of the evidence her hostile work environment claim?"). The Opinion errs in supplanting the jury's finding that there are no hostilities with the irreconcilable finding that there are "ongoing hostilities" in the workplace rendering reinstatement impossible (Op. at 3).

***No evidence of "ongoing hostilities."*** The Opinion's finding of fact that there is an "ongoing environment of hostility" (Op. at 3) is also against the weight of evidence.

First, there is uncontroverted evidence that Tudor does not harbor hostilities towards Southeastern. *Contra* Op. at 3 (hypothesizing that fruits of the adversarial process indicate "ongoing hostilities"). Dr. Tudor truthfully told the jury about the pain she has endured, but assured that this lawsuit is not about vengeance—it is simply her only pathway back to Southeastern.[1]

[1] Tudor opened her trial testimony by telling the jury that this lawsuit is not about vengeance, "It's about doing the right thing. It's about fairness and justice. It's about giving me a chance to contribute and to give back to so many who have made my accomplishments possible." ECF No. 246 39:2–8. Tudor further explained, "This case is about me getting my job back. I want to work. I've always just wanted to be able to do my job, just like I think

Dr. Tudor also testified extensively that this litigation has not poisoned her against Defendants.[2] Additionally, Tudor submitted lengthy declarations wherein she disclosed to the Court her positive feelings about Southeastern (ECF No. 268-1 ¶ 4), that this litigation has not poisoned things (*id.*; *id.* ¶ 7(a)), her positive feelings about her Southeastern colleagues in the Department (*id.* ¶ 5(a); ECF No. 271-1 ¶ 5(a)–(c)) and the new Southeastern administration (ECF No. 268-1 ¶ 6(b)), and her conviction that a healthy reunion is not only possible but probable (see, e.g., *id.* ¶ 6; ECF No. 271-1 ¶ 5(c)).

Second, there is uncontroverted evidence that, *at this juncture*, Southeastern harbors no ill-will towards Tudor. Prior to trial, Dr. Prus and President Burrage openly and matter-of-factly explored Tudor's return (ECF No. 271-3 ¶ 3; *id.* at 14–15); neither indicated Tudor's return was impossible because of "ongoing hostilities." Leading up to and at trial, four out of seven of the English Department's tenured professors attested that they do not oppose Tudor's return.[3] Most tellingly, Defendants' lead counsel, Ms. Coffey,

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anybody else would want to, especially if you've trained for something, you've worked for something your entire life." *Id.* at 129:7–10.

[2] *See, e.g.*, ECF No. 246 at 129:15–24 (Question: "After all of this, do you think, truthfully, if given the opportunity to go back and teach, you could put this all behind you and teach?" Answer: "Yes. Yes, of course. Yes. The classroom, it's—I call it my clean, well-lighted place. It's where I feel safe and secure. My department is a place where I feel welcome and at home. The students were always welcoming, and I see no downside to it. It's—I can't think of any reason not to return.").

[3] Dec. Dr. Dan Althoff, ECF No. 205-17 at 8 ¶ 10 ("[I]f Tudor were to return to Southeastern this would be a non-issue for the faculty. There is no bad blood between

promised the jury that Defendants have not and never would tolerate hostilities towards Tudor[4] and assured that this litigation itself has neither uncovered evidence of concrete hostilities nor caused them.[5]

Post-trial events show a similar lack of hostilities. Dr. Cotter-Lynch, a high-level Southeastern administrator, attests that there is no vocal opposition to Tudor's return on campus and no one in the Department will oppose Tudor's return if it is ordered by this Court (ECF No. 268-2 ¶ 5(a); *id.* ¶ 9). President Burrage and a prominent RUSO regent—both of whom attended trial—extended an olive branch to Cotter-Lynch, expressing a desire for conciliation and healing for all, including Dr. Tudor (ECF No. 268-2 ¶ 8(c)(i)–(iii)). Ms. Carolyn Fridley, an instructor in the Department and respected member of the Southeastern community, advised the Court that she "would personally welcome" Tudor's return (ECF No. 271-4 ¶ 4). Most tellingly, in the immediate hours after the verdict, President Burrage released an indisputably sincere public statement proclaiming that all of

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Tudor and the Southeastern faculty."); ECF No. 264 at 450:3–6 (Dr. Mark Spencer testifying "I don't have any particular problem" with Tudor returning); id. at 429:18–20 (Dr. John Mischo testifying he would welcome Tudor back to Southeastern); Exhibit 3 ¶ 4(Ms. Carolyn Fridley would "welcome Dr. Tudor back"); ECF No. 263 at 352:16 (Cotter-Lynch testifying, "I want her to come back to her job. She earned it.").

[4] *See* ECF No. 246 at 36:6–9 ("What is a university if it is not a place that fosters ideas, encourages personal growth, encourages difference, supports change? That was the campus of Southeastern. That is the environment that Rachel Tudor worked in.")

[5] *See* ECF No. 246 at 35:22–25 ("[T]hese supposed hostile work environments [] just didn't exist. After several years of investigation, two and a half years of litigation, there is still no evidence . . . ."); ECF 266 at 853:16–18 ("there has been no evidence of hostilities that Dr. Tudor was subjected to, no evidence at all").

Southeastern "respects the verdict rendered today by the jury" (ECF No. 268-2 at 15). Burrage's statement speaks volumes. Remarkably, Burrage went one step further, personally meeting with Southeastern faculty to request their assistance in healing the campus and Tudor (ECF No. 268-2 ¶ 8(c)(ii)).

Third, on the eve of trial, Defendants entered into a robust and historic Compromise Agreement with the United States, evidencing a sincere and good faith desire to mend relationships. Key terms of the Agreement mandate extensive policy changes at Southeastern to prevent what happened to Tudor from recurring *and* oblige Defendants to specially protect Tudor from discrimination and retaliation in their workplace (ECF No. 268-3 ¶ 16).

Plainly, the Compromise Agreement evidences both a significant change in Defendants' approach to Tudor and indisputable proof of institution-wide commitment to do the right thing going forward. Moreover, the Agreement sets the stage for peaceful reunification, not unbridled hostilities. After-all, Defendants' could not have committed to specially protect Tudor in their workplace if they did not believe themselves capable of treating Tudor fairly and licitly upon her return. Lastly, nothing in the record suggests let alone evidences that Defendants entered into the Compromise Agreement in anything other than good faith, with an eye towards bettering Southeastern and mending relations with Tudor.

***Counsel have not poisoned the environment.*** The Opinion found, in part, that Tudor's return is infeasible because there is "at least some evidence" of tension between the parties in the form of "unnecessary attacks on individuals and their character or credibility" Op. at 3. Respectfully, the record does not sustain a finding of fact that counsel have poisoned relations between the parties. There is no trial or deposition testimony, declaration or statement, or evidence of any other kind indicating that counsel (any counsel) have sown, perpetuated, or fanned hostilities between the institutions and the real persons involved in this case such that reinstatement is impossible.

***Students will not be harmed if Tudor returns.*** On the premise that there are "ongoing hostilities," the Opinion found as fact that Southeastern's students would be harmed by reinstatement. Op. at 3 ("Such an environment would be patently unfair to the students at that school."). While the wellbeing of Southeastern's students is of course an important concern, the record does not support a finding that the students will be harmed by Tudor's return.

First, incontrovertible evidence shows that during the period of greatest tension—Tudor's protected activities in 2010 and 2011—Tudor thrived in the classroom and Southeastern's students were well-served. For example, Tudor was nominated for Southeastern's Excellence in Teaching Award in 2010 and 2011 (ECF No. 271-2 at 47–49). Additionally, student evaluations from Spring 2011–Tudor's last and most difficult semester on

campus—show Tudor's students gave her exceptionally high reviews. Indeed, Tudor out-preformed her department, Southeastern, *and* nationwide averages that term. *See* ECF No. 271-2 at 25. Given that Tudor ensured that Southeastern's students thrived even at the height of Defendants' misconduct towards her, there is no reason to believe that they could not do so again now that a jury of Oklahoman citizens has fairly adjudicated the very dispute that precipitated this litigation in the first place.

Second, uncontroverted evidence of current student sentiments makes clear they harbor no concerns about Tudor's return. Indeed, the students' only fears center on the financial costs of Southeastern's defense of Tudor's suit, not Tudor's reinstatement.[6]

**B. Tudor has the capacity to perform her job.**

Reconsideration is also warranted here because the Opinion's findings related to Tudor's qualifications for tenure are in tension with both the jury's verdict and the record. *Contra* Op. at 3–4 ("Defendants have offered substantial competent evidence demonstrating that they are convinced that Plaintiff's teaching abilities and academic pursuits do not rise to the level which would warrant a tenured professorship at Southeastern.").

[6] *See* ECF No. 271-3 § (6) (Tudor's verdict has been positively received on campus and that the only issue raised by students is concern over how Southeastern will fund its defense of this litigation); ECF No. 271-3 at 35 (Faculty Senate minutes revealing that Southeastern administrator Dr. Bryon Clark had spoken with students and their only concern is the financial cost of this litigation).

***Jury's verdict forecloses reexamination of Tudor's merit.*** The jury found that Tudor's 2009-10 tenure application merited tenure and the only reason Tudor was deprived of tenure was Defendants' illicit actions, not their beliefs concerning her merit. *See* ECF No. 262 at 1 (answering in the affirmative to the question "Has Plaintiff proven by a preponderance of the evidence that she was denied tenure in 2009-10 because of her gender?"). If discrimination was not the cause of denial, Tudor could not have prevailed. *See generally* ECF No. 257 at 12–13 (Jury Instruction No. 7 titled "Title VII—Tenure"). Given this, the Opinion's finding that Defendants' believe Tudor did not merit tenure in 2009-10 is error because it irreconcilably conflicts with the jury's verdict.

***Tudor's "teaching."*** Another basis on which the Opinion denies reinstatement are the findings that Dr. Prus opposes reinstatement because of Tudor's "teaching style" (Op. at 2–3) and Southeastern believes the circumstances of Tudor's separation from Collin College show she is "not a good teacher" (Op. at 4). These findings are not supported by the record.

Dr. Prus never testified that he opposes Tudor's return because of her "teaching style." Moreover, that conclusion is not tenable given Prus' actual testimony and other evidence. At trial, Prus stated he vaguely recalled observing Tudor in the classroom on two occasions and, without benefit of exhibits, said that he thought his impression at the time was that she "could

have been more engaging." ECF No. 264 at 466–67. But Prus was quick to clarify that Tudor's teaching performance was not disqualifying and her skills were on par with those of other tenured professors at Southeastern. *Id.* 467:16–18. Prus' contemporaneous memorializations of the classroom observations shed greater light on his true impressions of Tudor. Therein, Prus asserts Tudor is "certainly knowledgeable" (ECF No. 271-1 at 2) and employs "appropriate pedagogy" (*id.*); Prus was also "quite impressed by the level of instruction and the energy in the classroom" (*id.* at 4).

As to Tudor's teaching at Collin College and the circumstances of her separation—there is no deposition or trial testimony, declaration, statement, or evidence of any other kind showing that Southeastern academics have reviewed Tudor's Collin College record and determined it to be poor, let alone that they believe it is reason to keep Tudor out of Southeastern.

Additionally, there is no evidence showing that Tudor separated from Collin College because "she was not a good teacher." *Contra* Op. at 4. Not a single person affiliated with Collin College testified in this matter about the reason for Tudor's separation. This is despite the fact that Defendants previously told the Court that such testimony was necessary to prove why Tudor separated.[7] The only evidence Defendants pointed to is a single

[7] *See, e.g.*, ECF No. 213 at 5 ("Dr. Weasenforth's testimony will directly challenge the veracity of Intervenor's lofty opinion of her abilities, and will explain why the administration at Collin College determined that Intervenor was not qualified to be a

document[8] that is both taken out of context and does not say that Tudor is "not a good teacher." Against that document, Tudor proffered letters of recommendation from Collin College colleagues commending her teaching (ECF No. 271-2 at 51–53) and a declaration from Mrs. Jonelle Weier (ECF No. 271-5), one of Collin College's and Tudor's star students. Weier took time during her Christmas break from Harvard University (where she transferred after taking classes with Tudor at Collin), to tell this Court that "Dr. Tudor's teaching is a great exhibit of what professors in higher education should strive to be" (*id.* ¶ 19).

***Tudor's "academic pursuits."*** The Opinion is also premised on the finding that current Southeastern employees deem Tudor's post-termination "academic pursuits" so deficient as to make reinstatement impossible (Op. at 3). However, there is no deposition or trial testimony, declaration, statement, or evidence of any kind showing that academics at Southeastern have

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professor at their institution, as well as the reason they chose not to renew her contract."); *id.* (arguing that testimony "from a dispassionate third-party such as Dr. Weasenforth" is necessary to prove Tudor's teaching is poor).

[8] There are several problems with this "evidence." First, the January 11, 2016 document (ECF NO. 270-7) is merely a recommendation from Weasenforth about Tudor's contract—the ultimate decision on renewal is made by Collin College's governing board; no testimony or documents going to that decision is in evidence. Second, the January 2016 document states Tudor "needs improvement" in minute aspects of teaching, not that she is a "bad teacher" or that her teaching is the reason for separation (ECF No. 270-7 at CC307). Third, Tudor has pointed to strong evidence showing that Weasenforth's nonrenewal recommendation was retaliatory. Specifically, Tudor showed evidence that Weasenforth originally recommended her for renewal in a document dated September 14, 2015 (ECF No. 271-2 at 77–88), but that Weasenforth changed his recommendation after Tudor requested that he make corrections to his narrative evaluation because it overly emphasized student complaints that Collin College found meritless. *See* ECF No. 271-1 ¶ 3(c).

reviewed Tudor's current curriculum *vitae* (ECF No. 268-1 at 15–24) and concluded that Tudor cannot do her job.[9] The only academic fact witness who has offered testimony concerning Tudor's post-Southeastern work is Dr. Cotter-Lynch, whom swears Tudor's record supports reinstatement.[10]

**C. No risk of Tudor being made to feel "unworthy" if she returns.**

The Opinion finds as fact that if Tudor were to return to Southeastern she would be "considered unworthy" by her colleagues and thus reinstatement is infeasible. Op. at 4. The record does not support this finding.

[9] The Court held that Defendants believe Tudor's work product since leaving Southeastern is so deficient that reinstating her is infeasible. Op. at 3. There are compounded errors here. First, the only "evidence" Defendants' presented speaking to their assessment of Tudor's current qualifications is argument of their attorney, Mr. Joseph, which is not evidence. To support this finding of fact Defendants must supply testimony from a Southeastern fact witness who has evaluated Tudor's current academic qualifications. None was provided. Second, due to an analytical error of Mr. Joseph's, the Court has misapprehended Tudor's current qualifications. Mr. Joseph proffered to the Court a 2012 copy of Tudor's curriculum *vitae* ECF No. 270-16 at 4–11; see also ECF No. 271-1 ¶ 4(c) [Tudor identifying document as part of a 2012 job application]), and reasoned based upon that document alone that Tudor did not have any teaching, scholarship, or service between 2012 to 2017–a six year period—and therefore she did not merit tenure. Tudor's current *vitae*, which she provided to the Court in support of her motion for reinstatement (ECF No. 268-1 at 15–24), is nine pages long, is substantially different, and contains new achievements and accomplishments Joseph did not assess. Among other things, it shows Tudor gave an invited lecture titled "Post-Truth America: A Native American Guide to Survivance" at a public college in New Jersey in 2017 and that she was bestowed with a civil rights award by Oklahomans for Equality in 2016.

[10] Cotter-Lynch attests that she: reviewed Tudor's current curriculum *vitae* (ECF No. 271-3 at ¶ 5(d)); discussed and assessed Tudor's scholarship, teaching, and service capacity with Tudor recently (ECF No. 271-3 ¶ 5(a)–(e) [positively evaluating Tudor's scholarship]; ECF No. 268-2 ¶ 7(c) [similar positive review of Tudor's scholarship]; *id.* § 7(a) [positive review of Tudor's teaching]; *id.* ¶ 7(b) [positive review of Tudor's teaching]); and concluded that Tudor is fit to return to Southeastern (*id.* ¶ 7 ["I have absolutely no reason to believe that, if Tudor returns to Southeastern, she would be unable to meet Southeastern's exacting standards in the areas of teaching, service, and scholarship."].

***Tudor has no propensity to feel "unworthy."*** There is no evidence that Tudor is predisposed to feel "unworthy" if she returns to Southeastern let alone that those feelings would make her return unworkable. Indeed, Tudor attests that she feels "vindicated" by the jury's verdict (ECF No. 268-1 ¶ 1), that she believes the verdict resolves any "lingering doubts" there may be about her qualifications (*id.* ¶ 9), and that she looks forward to returning to work at Southeastern despite this protracted litigation (*id.* ¶ 7(a)).

***Dr. Prus' opinion on tenuring Tudor.*** The Opinion also misapprehends Prus' testimony regarding Tudor's scholarship and, ultimately, Prus' opinion on tenuring Tudor. Prus never testified that Tudor had a total "lack of scholarly activity" at the time of her 2009-10 application or that the 2009-10 application forever convinced him that she does not merit tenure. *Conta* Op. at 4 (finding Prus testified Tudor's "lack of scholarly activity" was the reason he voted against tenure in 2009-10 and that this is why Prus' opposes reinstatement). At trial, Prus said he recalled thinking Tudor's 2009-10 application "didn't quite show promise" (ECF No. 474:7). However, Prus clarified that any lingering doubts he had were quelled by the time of Tudor's 2010-11 application. By that juncture, Prus believed that Tudor merited tenure (*id.* 486:6–14). Moreover, Prus has not testified that he believes Tudor does not presently merit tenure.

***Dr. Prus' opinion of Tudor's publication record.*** The Opinion finds as fact that Tudor will feel "unworthy" if she returns because she has not published articles "in the last six years," implying that Dr. Prus in particular will be so critical that new litigation will brew. *Op.* at 4. The record does not support this finding.

Dr. Prus neither deems professors to "lack scholarly promise" nor labels them "unworthy" simply because they experience a publication dry spell. At present, Tudor has a career total of fourteen *published* articles (ECF No. 268-1 at 17–18 [showing eleven peer review articles and three book reviews]), with more on the way (see *infra* Part IV). Prus himself has a career total of two publications, the most recent of which was published fourteen years ago. *See* ECF No. 271-3 at 26–27 (showing two peer review articles, two "proceedings," and three "poetry collections"; also showing Prus' most recent publication came out in 2004). As explained by tenure expert Dr. Parker, it is a given that all of the tenured professors in the Department merit tenure. ECF No. 263 at 236:7–14. Further, the tenured faculty's achievements fairly set the bar for what is expected in the Department. *Id.*; *see also* ECF No. 205-16 at 1 (Parker Report: achievements of Department professors awarded tenure by Southeastern "define[] a level of qualifications that Southeastern, by its own standards, has decided merits tenure and promotion"). Using Prus' own work product as a guidepost, Tudor easily meets the mark both in terms

of quantity of publications (fourteen is more than two), and frequency of publication (a six-year dry spell is considerably shorter than a fourteen-year dry spell).

**D. Other Findings Unsupported by the Record**

***Dr. Cotter-Lynch's testimony.*** The Opinion also made findings of fact concerning the testimony of Cotter-Lynch which are unsupported by the record. The Opinion held that Cotter-Lynch's testimony in support of reinstatement must be discounted because she never saw one of Tudor's tenure packets or Tudor teach. Op. at 4. However, Cotter-Lynch testified at trial that she both read Tudor's 2010-11 tenure packet (ECF No. 263 at 359:10–13) and has seen Tudor teach (*id.* at 336:12–15).

***New Litigation.*** The Opinion is also premised on the finding that it would be a disservice to the parties for Tudor to be reinstated because new litigation would result. *See* Op. at 4 (reinstatement "would lead to renewed litigation between the parties and again, that result is unacceptable"). But there are no facts in the record which evidence that new litigation will ensue if Tudor returns. Plainly, Tudor has no reason to sue Southeastern if she returns with tenure. Indeed, Tudor told the Court that tenure is her goal and she does not foresee other problems if she returns (ECF No. 268-1 ¶ 7(a)–(d)). Conversely, Southeastern has no legal cause of action against Tudor if she returns. Indeed, the prospect of a lawsuit of that ilk is highly unlikely as it

would trigger a breach of the Compromise Agreement (ECF No. 268-3 at ¶ 16) *and* a violation of Title VII. Dispositively, there is no evidence that Southeastern has threatened to sue Tudor if she returns.

***Missing Evidence Produced by Tudor.*** The Opinion is also premised on the erroneous finding that Tudor presented only her own declaration and that of Cotter-Lynch as evidence in support of reinstatement. *See* Op. at 4 ("Other than her own testimony, Plaintiff's only evidence in favor of reinstatement was the testimony of Dr. Meg Cotter-Lynch."). However, Tudor presented *six* declarations and hundreds of pages of other new evidence to the Court[11] as well as cited to trial testimony and other parts of the record in her

[11] Tudor proffered: two declarations from herself (ECF Nos. 268-1 and 271-1); two declarations from Cotter-Lynch (ECF No. 268-2 and 271-3); a declaration from Ms. Carolyn Fridley, an instructor in the Department (ECF No. 271-4); a declaration from Tudor's former student at Collin College, Mrs. Jonelle Weier (ECF No. 271-5); ninety-one pages of RateMyProfessor.com ratings (ECF No. 271-6); eight formal classroom observations, including five from her time at Southeastern and three from Collin College (ECF No. 271-7); forty-three pages of student evaluations, thank you notes, and emails (ECF No. 271-2 at 2–45); twelve letters of recommendation from her Southeastern colleagues (ECF No. 271-8); two letters of recommendation from her Collin College colleagues (ECF No. 271-2 at 51–53); a copy of Southeastern's new nondiscrimination policy which specially protects transgender persons from sex discrimination (ECF No. 268-2 at PI002070–2118); a press release from Southeastern expressing support for the jury's verdict (ECF No. 268-2 at 15); RUSO business records showing removal of the health plan's transgender exclusion (ECF No. 268-4); records showing Collin College investigated several of the student complaints against Tudor and found them to be meritless (ECF No. 271-2 at 55–57; *id.* 271-2 at 75); a syllabus from one of Tudor's recent classes (ECF No. 271-2 at 59–70) and an essay assignment (ECF No. 271-2 at 72–73); an email chain between Dr. Prus and Tudor showing Prus supported Tudor's 2010-11 application as well as offered to write her letters of recommendation for the job market if she did not win tenure (ECF No. 271-2 at 90); and Tudor's original 2015 contract renewal evaluation from Collin College which shows when compared to ECF No. 270-7 that, prior to Tudor's complaints about discrimination, her supervisor recommended her contract for renewal.

reinstatement bid (*see generally* main motion [ECF No. 268] and reply [ECF No. 271]).

## II. CONFLICTS WITH BINDING PRECEDENT

Since the beginning, reinstatement has been Title VII's preferred remedy. Reinstatement is normally not denied. While the Court has some discretion, it is limited. Dr. Tudor respectfully submits that key holdings of law in the Opinion conflict with binding precedent.

***Reinstatement can only be denied in rare cases.*** The Opinion cites *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003), for the proposition that the ultimate question of reinstatement is left to the district court's discretion (Op. at 2). However, other binding precedents clarify considerable limits on the court's power to deny reinstatement. For instance, *Bingman v. Napkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991), teaches that reinstatement may only be denied where there are concrete factual findings showing "special instances of unusual work place hostility or other aggravating circumstances." The Tenth Circuit has clarified in other cases, like *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989 (10th Cir. 1994), that nearly every reinstatement will cause tensions in the workplace and that those inevitable tensions cannot sustain denial. *Id.* at 997 (holding that neither a shouting match between employee and potential direct supervisor or having to work under supervisor who testified in favor of

employer at trial support finding that reinstatement is infeasible due to hostilities). *Contra* Op. at 3 (denying reinstatement in part because the Court believed Tudor's return might "create an ongoing environment of hostility").

***One-sided employer resistance is no grounds to deny reinstatement.*** The Opinion is premised in part on the holding that there may be one-sided hostilities from Southeastern if Tudor returns on that basis denied reinstatement. Op. at 4 (speculating that if Tudor returns to Southeastern there may be an environment "where she is considered unworthy"; holding that Prus would deem Tudor unworthy if she returned). This is also error. In *Jackson v. City of Albuquerque,* the Tenth Circuit teaches that reinstatement cannot be denied because of "[a]ctual or expected ill-feeling." 890 F.2d 225 (10th Cir. 1989). *Jackson* also teaches that reinstatement cannot be denied where "impossibly high" hostilities in the workplace are one-sidedly pushed by the employer. Indeed, the *Jackson* Court goes so far as to hold that if an employee "want[s] to return to a hostile work environment," she is entitled to do so. 890 F.2d at 235.

***Employer's past poor treatment cannot support denial of reinstatement.*** The bare fact that an employer mistreated an employee in the past is not, without a clear record of present hostility supported by contemporaneous testimony bearing on this issue, grounds to deem reinstatement infeasible. *See Bingman*, 937 F.2d at 558 n.8 (approving

approach articulated in *Marshall v. TRW, Inc. Reda Pump. Div.* for Title VII reinstatement remedies); *Marshall v. TRW, Inc. Reda Pump. Div.*, 900 F.2d 1517, 1523 (10th Cir. 1990) (holding under Oklahoma's nondiscrimination laws that reinstatement not infeasible simply because the jury found a retaliatory discharge absent record testimony evidencing extreme hostilities). The Court thus errs by adopting a conflicting rule that Defendants' record of past bad treatment of Tudor is reason to deny her reinstatement. *See* Op. at 4 ("Placing Plaintiff back into an environment where she is considered unworthy would lead to renewed litigation between the parties and again, that result is unacceptable.")

***Only concrete evidence of "extreme hostility" can support denial of reinstatement.*** The Opinion cites one precedential case, *EEOC v. Prudential Assoc.*, 763 F.2d 1166, 1172 (10th Cir. 1985), for the proposition that "continuing hostility" between the employee and employer is grounds to deny reinstatement[12] (Op. at 2). But *Prudential* does not adopt a "continuing

[12] The Opinion cites one non-precedential, *Thornton v. Kaplan*, 961 F.Supp. 1433, 1437 (D.Colo. 1996), for the same proposition (Op. at 3). But *Thornton* is distinguishable on the facts. The *Thornton* Court made extensive findings of fact regarding the employee and employer's testimony at a hearing on reinstatement, ultimately concluding that the cluster of facts evidence reinstatement was infeasible. *Thornton*, 961 F.Supp. at 1435–36. But the facts in the instant case are not at all aligned with those in *Thornton*. As a threshold matter, the Court did not conduct a hearing for the purpose of gathering present impressions of the level of hostilities between the parties *after* the jury verdict. Indeed, the *Thornton* Court made clear that its assessment of present "hostilities" was crucially informed by evidence and observations taken from that hearing. *Thornton*, 961 F.Supp. at 1439. Additionally, the specific kinds of hostilities present in *Thornton* are not evidenced here. For example, Tudor has not testified to being apprehensive about returning to

hostility" test. Rather, *Prudential* recognizes in *dicta* the longstanding rule that reinstatement may only be denied where there is evidence that the *employer* exhibits "such *extreme hostility* that, as a practical matter, a productive and amicable working relationship would be impossible" *and* the employee does not wish to return (763 F.2d at 1172) (emphasis added). In this case, there is no evidence of extreme hostilities *and* Tudor wants to return.

Other Tenth Circuit precedents make clear that the high mark of "extreme hostility" is not met with just a finding of "some evidence of hostility" (Op. at 3). For example, *Spulark v. K Mart Corp.*, 894 F.2d 1150, 1157 (10th Cir. 1990) observes that the existence of extreme hostilities can be divined only where the employee opposes returning and she testifies that she would be unable to function if she returns. *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) teaches that reinstatement is only to be denied where there is clear evidence of a "high degree of magnitude" of hostility. *Fitzgerald* clarifies that such hostilities are shown where the employee proffers evidence that the employer engages in "psychological warfare" against her, that retaliation is inevitable upon her return, and she

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Southeastern, the persons responsible for discriminating and retaliating against Tudor are no longer in the workplace, Tudor is not afraid that persons whom testified on her behalf at trial face retaliation from the current administration, Tudor does not harbor distrust of the present administration, and no Southeastern personnel have proffered sworn testimony to the Court indicating that they plan to retaliate against or otherwise harm Tudor if she returns.

does not ultimately wish to return (*id.*). None of those conditions are met here.

***Employee's frustrations with employer arising in post-termination legal proceedings cannot preclude reinstatement.*** The Opinion is also premised on the holding that there are supposed hostilities apparent in briefs, for which Tudor may bear some responsibility, and, as a result, deems reinstatement unavailable. *See* Op. at 3. That holding conflicts with *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999), which teaches that post-termination conduct of the employee in the heat of legal proceedings cannot limit equitable relief. Therein, the Tenth Circuit held that even though the employee physically assaulted and swore at the employer at a post-termination legal proceeding, that outburst is no reason to limit relief. *Id.* Indeed, the *Medlock Court* went on to observe that any contrary rule is unworkable given that "[i]t is not difficult to envision a defendant goading a former employee into losing her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her temper." *Id.* at 555 n.7. Under *Medlock*, Tudor's briefs cannot be a bar to reinstatement.

***Employer's beliefs about employee's merit are immaterial once the Title VII violation has been proven.*** The Opinion also holds that because reinstatement is infeasible because Defendants represent that they believe

Tudor's "teaching abilities and academic pursuits . . . do not rise to the level which would warrant a tenured professorship at Southeastern" (Op. at 3). This is error. Defendants' beliefs concerning Tudor's dessert of tenure are legally immaterial. If the rule was otherwise, all a recalcitrant employer would have to do to forever lock out victims of discrimination is double down on its disproved nondiscriminatory rationale, which frustrates the purpose of Title VII. *See, e.g.*, *Jackson*, 890 F.2d at 233 (citing with approval reasoning from *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1106 (5th Cir. 1987), that to do otherwise would "give credence to deception").

## III. EQUITABLE CONSIDERATIONS

Dr. Tudor also respectfully brings to the Court's attention equitable considerations which warrant reconsideration and, ultimately, reinstatement.

***Defendants should be judicially estopped from using the Collin College record to preclude reinstatement.*** The Opinion relies on Defendants' representation that they deem Tudor's Collin College record to prove she is a "bad teacher," which they claim justifies their original illicit decisions *and* makes reinstatement impossible. (Op. at 3–4). Defendants' argument is, by definition, one of after-acquired evidence. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995) (defining after-acquired evidence as evidence which the employer lacked at the time of the illicit employment

action but later uses to contest award of reinstatement once liability is proven).

But Defendants' cannot use Tudor's Collin College record to this end. Defendants previously took the litigation position that they have no after-acquired evidence and will not use the Collin College record as such.[13] Defendants' past representations to this Court are the exact situation in which the equitable doctrine of judicial estoppel is applied. *See, e.g., Eastman v. Union Pacific R. Co.*, 493 F.3d 1151 (10th Cir. 2007) (*quoting New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (doctrine's "purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment"). Thus, Tudor's Collin College record cannot be a factor in the reinstatement decision.

***Tudor should be protected, not punished.*** The Opinion is premised in part on the judgment that it is better to withhold reinstatement from Tudor than to risk her return precipitating new litigation. Op. at 4. But prophylactically denying Tudor the job that discrimination deprived her of stands equity on its head. Tudor does not desire more litigation, she just wants her job back. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982)

[13] *See, e.g.*, ECF No. 213 at 2 ("Defendants have been consistently candid about the fact that they are not in possession of any after-acquired evidence."); *id.* (responding to Tudor's request to exclude the Collin College record from evidence that it is not "after-acquired evidence").

("Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits."). Ultimately, it is Defendants that bear the responsibility of preventing future Title VII violations, and it is Tudor's obligation to report those violations. *See generally Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

If this Court has found evidence that Defendants are prone to violate Title VII again, the correct, equitable result is for the Court to exercise its expansive powers and take steps to protect Tudor upon her return, not to acquiesce to Defendants' proclivity for wrongdoing. *See Brown-Crummer Inv. Co. v. City of Purcell*, 128 F.2d 400, 404 (10th Cir. 1942) ("A court of equity is a forum of conscience. It acts when and as conscience commands. It exacts of those coming within its portals and applying for relief that they come with clean hands and right conduct.").

***Students should not be shielded from truth.*** The Opinion is also premised on the judgment that Southeastern's students would suffer if Tudor returns given the Opinion's assumption that "hostilities" between Tudor and Defendants harm the students (Op. at 3). But equity does not support shielding Southeastern's students from Tudor or the consequences of this litigation.

First, equity seeks truth rather than evasion. *See, e.g.*, *Tidewater v. Dobson*, 195 Or 533, 577 (Or. 1952) (*en banc*). Tudor's return to campus will

inevitably draw attention to Defendant's past misdeeds. What happened to Tudor is regrettable, shameful, and ultimately illegal. But these hard truths are not something this Court should spare Defendants from, let alone help Defendants hide from the students.

Second, equality is equity. *Green v. Biddle*, 21 U.S. 1, 26 (1823). This ancient wisdom teaches that all persons similarly situated should be treated equally. This maxim commands that the Court treat the interests of the innocents involved—Southeastern's students and Tudor—as equals and not sacrifice the needs of one for the other (*id.*). Here, Tudor and the students have aligned interests—they desire to be free from unlawful interference and to be part of a safe, peaceful university community. The Court need not deny Tudor reinstatement in order to protect the students. For instance, the Court can craft conditions of reinstatement that ensure Tudor is protected and fully reintegrated into the workplace and the students are apprised of their rights to be free from illicit acts. *See Jackson*, 890 F.2d at 235 (indicating district court should carefully craft "conditions" of reinstatement to prevent problems rather than deny reinstatement).

Third, equity sees that what is done is what ought to be done. *See Owens v. Continental Supply Co.*, 71 F.2d 862, 863 (10th Cir. 1934). The jury found that Dr. Tudor earned tenure (ECF No. 262 at 1). Workplace discrimination is an all too common phenomena—many of Southeastern's

students will regrettably experience it or be in a position to remedy it themselves one day. Tudor deserves to get her job back at Southeastern, and the students will benefit from her return. Tudor's return will teach Southeastern's students that our nation's employers must remedy long-festering wrongs. It will also teach the students that victims of employment discrimination have the full force of our courts to make wrong, right. Conversely, denying reinstatement teaches the wrong lessons. It sends the message that the students are too fragile to be part of righting a wrong. It also signals that some wrongs need never be righted.

## IV. SUBSTANTIAL CHANGE IN CIRCUMSTANCES

In the Opinion, the Court held that Defendants' purported concern about the frequency of Tudor's scholarly activities (Op. at 4) is reason to deny reinstatement. The undersigned attests to the following: On February 8, 2018, Dr. Tudor submitted a 27-page scholarly article entitled "Exiles in Our Own Land: Native American Novelists" for consideration to a well-regarded peer review journal. Additionally, Dr. Tudor has written and will submit a proposal titled "Unconquered and Unconquerable," for inclusion in a forthcoming anthology under contract with the University of Colorado Press the week of February 12, 2018. Dr. Tudor also plans to submit a presentation proposal for an upcoming academic conference (held at Southeastern) the week of February 12, 2018.

Dated: February 9, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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)