

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

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

**PLAINTIFF DR. RACHEL TUDOR'S
MOTION AND INCORPORATED BRIEF IN SUPPORT OF
RECONSIDERATION OF REINSTATEMENT OR,
ALTERNATIVELY, FOR FRONT PAY**

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Dr. Tudor respectfully requests that the Court reconsider reinstatement as a remedy given new evidence. If reinstatement is still deemed infeasible, Tudor alternatively requests that she be awarded front pay to compensate her for the total loss of her professional career.

I. Reconsider Reinstatement In Light of New Evidence¹

There is newly available evidence that shows Tudor's healthy reunion with Southeastern is possible.

On February 20, 2018 Tudor was invited by Southeastern's chapter of the American Association of University Professors ("AAUP") as a special guest to give a presentation entitled "The Faculty Appellate Committee's Role in Assuring Equity in Academic Freedom and Shared Governance" at AAUP's statewide conference held at Southeastern in March 2018 (Exhibit 3 (a)–(b)). (A true copy of Tudor's proposal is attached as Exhibit 1.)

The AAUP Oklahoma conference is one of Southeastern's flagship events (Exhibit 4 ¶ 4(b)). The conference is a statewide covering of AAUP hosted by Southeastern, and brings together the Southeastern community and special guests to explore themes in faculty governance and welfare. This

¹ Because a final judgment has not yet been entered in this case, the Court has general discretionary authority to review and revise its earlier Order denying reinstatement (ECF No. 275). *See, e.g., White Oak Global Advisors, LLC v. Pistol Drilling, LLC*, 2015 WL 11236850 at *1 (W.D.Okla.) (Cauthron, J.) (*citing Wagoner v. Wagoner*, 938 F.2d 1120, 1122 n.1 (10th Cir. 1991)). Under these circumstances, the Court "is not bound by the strict standards for altering or amending a judgment encompassed in Federal Rules of Civil Procedure 59(e) and 60(b)." *Id.*

year, Dr. Tudor shares the honor of presenting at this prestigious event along-side her other respected Southeastern colleagues, including President Burrage, former President Snowden, and Dr. Meg Cotter-Lynch. (A true copy of the AAUP conference schedule showing Tudor as an invited featured speaker is attached as Exhibit 2.)

The Opinion denying reinstatement (ECF No. 275), hinges on the finding of fact that the Southeastern faculty will be hostile towards Tudor's return (*id.* at 4), that healthy relationships between Southeastern and Tudor are impossible due to this litigation (*id.* at 3), that the Southeastern faculty believe Tudor is a bad teacher (*id.* at 3), and that Tudor's mere presence on campus is impossible because Tudor would be made to feel "unworthy" by the Southeastern faculty (*id.* at 4). The new evidence upends the Opinion's calculus.

Southeastern's invitation to Tudor puts to rest any doubt as to the faculty's feelings towards Tudor and their true assessment of her credentials and worth. The faculty has warmly welcomed Tudor back to campus to present (and *teach* them), evidencing Tudor's contributions are desired by Southeastern (Exhibit 4 ¶ 4(f)). Obviously, if the faculty had serious concerns about Tudor's merit, teaching, temperament, or collegiality or simply did not want her back, they would not have extended the invitation. The invitation is also proof that the faculty do not fear addressing Tudor's

past tenure experience head-on. Indeed, Tudor's presentation touches on the very same faculty appeals process she utilized while contesting the discriminatory and retaliatory tenure decisions in the 2009-10 and 2010-11 cycles (see generally Exhibit 1).

The invitation is also probative of the fact that both Southeastern and Tudor presently have the capacity and desire to mend relations. Based on her desire to contribute to Southeastern and her trust in the faculty, Tudor voluntarily submitted her presentation proposal. Southeastern returned Tudor's gesture with an olive branch, extending Tudor an invitation to present (Exhibit 4 ¶ 4(d)). This is the stuff of reconciliation and healing, not unbridled hostilities.

Lastly, the invitation is confirmation that there are no present hostilities at Southeastern that bar reinstatement. The invitation shows that both sides have the capacity to work together on a major conference. This is the exact sort of healthy work-relationship that will ensure that Tudor's reinstatement is a success. Coupled with the jury's finding that there was no hostile work environment² (ECF No. 262 at 1), the invitation makes clear

² The jury's determination that there was no hostile environment in the past is binding on this Court when it assesses the propriety of reinstatement. Though reinstatement (and front pay) are equitable remedies wholly within the Court's discretion, the jury's implicit factual findings and Tudor's Seventh Amendment rights preclude the Court making a finding of fact that conflicts with those implicitly made by the jury. *See Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. 2002) ("We have previously held that when legal and equitable

that Tudor is welcome on campus (Exhibit 4 ¶ 4(e)) and there are thus no legitimate impediments to reinstatement at this time.

Because the Court did not previously have the benefit of this new evidence, reconsideration of reinstatement is appropriate. *Cf. Snell v. Ashbury*, 792 F.Supp. 718 (W.D.Okla. 1991) (Cauthron, J.) (new argument not available at time of original summary judgment order supports reconsideration). *See also* ECF No. 278 (denying reconsideration of reinstatement on the premise that no new arguments or evidence were presented).

II. Alternatively, Award Tudor Front Pay

Though Dr. Tudor strongly desires reinstatement, if the Court denies reconsideration, Tudor respectfully asks that she be awarded front pay in the amount of \$2,032,789.51 to compensate her for the total loss of her future career earnings.³

issues to be decided in the same case depend on common determinations of fact, such questions of fact are submitted to the jury, and the court in resolving the equitable issues is then bound by the jury's findings on them."); *Brinkman v. Dep't of Corrections*, 21 F.3d 370, 372–73 (10th Cir. 1994) ("We have held that when fact issues central to a claim are decided by a jury upon evidence that would justify its conclusion, the Seventh Amendment right to a jury trial prohibits the district court from reaching a contrary conclusion.") Thus, the Court cannot premise denial of reinstatement on a finding that past hostilities continue to preclude Tudor's return to Southeastern since the jury found there was not a hostile environment in the first place.

³ Dr. Tudor respectfully preserves for the record that she continues to desire reinstatement as an Associate Professor with tenure at Southeastern Oklahoma State University rather than front pay. The instant motion should not be construed

A. If reinstatement is infeasible, front pay is appropriate.

Dr. Tudor respectfully requests front pay so that she may be made economically whole. “Front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.” *Abuan v. Level 3 Comm., Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003) (cleaned up). Front pay will ultimately return Dr. Tudor “as nearly as possible to the economic situation [s]he would have enjoyed but for the defendant[s]’ illegal conduct.” *EEOC v. Prudential*, 763 F.2d 1166, 1171–72 (10th Cir. 1985).

Front pay is proper in this case if Dr. Tudor’s preferred remedy of reinstatement has been denied due to Defendants’ hostilities. In such a situation, “front pay as a substitute for reinstatement is ‘a necessary part of the ‘make whole’ relief mandated by Congress’. . . .” *Abuan*, 353 F.3d at 1176 (quoting *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)).

B. Calculation of Front Pay

Under Tenth Circuit precedent, front pay should be calculated by assessing “work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work

as Tudor conceding she is not entitled to reinstatement nor construed as evidencing that Tudor no longer desires reinstatement.

opportunities, the period within which the plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value.” *Deboll v. Webb*, 194 F.3d 1116, 1144 (10th Cir. 1999).

Any uncertainties in calculation should be construed in Tudor’s favor. *Abuan*, 353 F.3d at 1180 (*quoting Prudential*, 763 F.2d at 1173 (“[T]he mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”)); *Metz v. Merrill Lynch*, 39 F.3d 1482, 1494 (10th Cir. 1994) (“uncertainty in determining what an employee would have earned but for discrimination should be resolved against the employer”) (cleaned up); *id.* (employee’s own testimony regarding front pay damages is adequate evidence to support claim).

Using the formula prescribed by *Webb*, Tudor should be awarded front pay in the amount of \$2,032,789.51. In support of this request, Tudor proffers the following:

(1) ***Work life expectancy.*** If the Court were to hold an evidentiary hearing to determine front pay, Dr. Tudor will testify that if she had been reinstated, she planned to work until at least the age of seventy-five (see Exhibit 3 ¶ 5(c)). Dr. Tudor is currently fifty-four years old, and will turn seventy-five in July 2039, which should fall towards the end of

Southeastern's 2039 Summer term (*id.* ¶ 5(d)). Thus, the appropriate period of front pay is approximately twenty-one years, measured from the date of the jury verdict (November 20, 2017) through July 2039.

(2 and 3) *Salary and benefits at termination and expected promotions and adjustments.* Because Tudor was terminated by Southeastern in connection with their illicit denial of her promotion and tenure, Tudor's front pay base salary and benefits should be calculated as if Tudor had not been denied tenure and promotion *rather* than based upon what Tudor was paid at the time of her termination in May 2011.⁴ *See, e.g., Abuan*, 353 F.3d at 1179–80 (front pay should be calculated based on likely promotions and pay bumps that would have occurred but for discrimination and retaliation rather than most recent salary). Southeastern's current "salary card" and benefits spreadsheet, both of which have been authenticated by Dr. Cotter-Lynch, is the starting point for computing front pay. *See* Exhibit 4 ¶ 5(a) (authenticating salary card, attached thereto as Exhibit A); *id.* ¶ 7(a) (authenticating benefits spreadsheet, attached thereto as Exhibit B).

⁴ At the time of her termination in May 2011, Southeastern paid Tudor an annual salary of \$51,279 per year not accounting for summer courses, class overages, traditional and professor benefits, or retirement (Exhibit 3 ¶ 6). Tudor's base salary was computed on "salary card," wherein her degree, seniority (termed "experience"), and rank were key factors. *Id.* If Tudor had not been illicitly denied tenure, her salary would have, at the very least, closely tracked that of Dr. Cotter-Lynch (Exhibit 4 ¶ 9).

The difference in compensation due to Tudor based on accumulating seniority and likely promotions is significant. Had Tudor remained at Southeastern, she would have received an additional \$546 in base salary each academic year in recognition of her accruing seniority. Upon promotion from Assistant Professor to Associate Professor, Tudor would have seen a base salary bump of \$3,036 (the difference between the base rate of the two ranks). Continuing onward, Tudor would have eventually seen another base salary bump of \$4,680 upon promotion from Associate Professor to Full Professor (the difference between the base rate of the two ranks).

Additionally, Tudor would have likely been given opportunities to take on administrative duties at Southeastern, also resulting in a significant salary bump. Administrative duties are compensated at a rate of \$2,190 plus 10% of base salary per year (Exhibit 4 ¶ 6(a)). If an evidentiary hearing were held, Tudor would testify that she would have taken on administrative duties, and held onto them for a period of at least ten years (Exhibit 3 ¶ 8(d)), which is reasonable and on par with others at Southeastern (Exhibit 4 ¶ 10(e)).

Tudor would also have had the opportunity to teach summer courses and class overages, both of which significantly boost salary. Most tenured professors at Southeastern have the opportunity to teach summer courses, which are compensated at a rate of \$3,700 per course (Exhibit 4 ¶ 6(b)(iii)).

Additionally, most tenured professors also have the opportunity to teach class overages—an extra class beyond the required four during the Fall or Spring terms—which are compensated at a rate of \$2,100 per course (*id.* ¶ 6(b)(ii)). If an evidentiary hearing were held, Tudor would attest that she would have at the very least taken on one class overage and one summer course per year (Exhibit 3 ¶(b)–(c)).

Lastly, the retirement contributions Tudor would be due from Southeastern are significantly affected by the above noted adjustments to her base salary. Under Southeastern's current benefit scheme, Southeastern contributes 7% of all wages and fringe benefits that exceed \$25,000 per year. See Exhibit 4 at appended Exhibit B. Thus, as Tudor's projected salary increases, so too do Southeastern's contributions increase.

(4) *Unavailability of other opportunities.* Front pay is usually adjusted downward to allow for expected mitigation of damages where it is likely that the plaintiff will find new employment. However, front pay should not be reduced where there is record evidence that mitigation is improbable. See *Webb*, 194 F.3d at 1144–45 (duration of front pay shall be period needed to make employee whole given their unique difficulties finding comparable work). See also *Cox v. Shelby State Cmty. Coll.*, 194 Fed.Appx. 267, 266–77 (6th Cir. 2006) (awarding professor front pay for remaining work life expectancy because it was unlikely to find comparable employment). Here,

there is considerable evidence that alternative, comparable employment opportunities are unavailable to Tudor, and thus compensating Tudor for the rest of her work life expectancy is appropriate.

Trial testimony and other evidence shows that, despite diligent efforts, Tudor has no chance of obtaining a tenured professorship at any other institution. Dr. Parker's and Dr. Cotter-Lynch's testimony shine a light on the double-bind Tudor finds herself in. Most schools will deem Tudor's tenure denial from Southeastern as disqualifying her for tenure-track jobs (Exhibit 17 at 332–33). Even if a school does not deem the tenure denial disqualifying, given Tudor's long work history at Southeastern, she will be deemed *too advanced* for tenure-track jobs (Exhibit 17 at 277). Logically, because Tudor cannot get any tenure-track job, she has no means of securing a job equivalent to the one the jury held she was illicitly denied.

Testimony from current and former Southeastern employees aligns with Parker's testimony. For example, Dr. Scoufos testified that tenure denial and ejection from one university almost always marks the end of one's career as a university professor and ruins a professor's professional reputation (Exhibit 18 at 596). Dr. Spencer also testified that denial of tenure puts one's entire career in jeopardy (Exhibit 19 at 437; *id.* at 434).

Tudor's mitigation efforts also evidence that it is unrealistic for her to obtain an equivalent tenured position at another university. Since her

termination from Southeastern in May 2011, Tudor has applied to more than one-hundred universities and colleges, seeking tenure-track positions where available (see, e.g., Exhibit 3 ¶ 4(b); Exhibit 5). In roughly eight years of searching for a job, Tudor was only able to obtain one year-to-year contract position with Collin College, a two-year community college that does not offer tenure (Exhibit 3 ¶ 4(b)). Tudor continued to apply for tenure track jobs while she was at Collin College and after Collin non-renewed her contract (*id.*). Tudor also continued to apply for new jobs and follow up on other outstanding applications after the trial (*id.* ¶ 3(a)). Unfortunately, Tudor's diligent efforts have not panned out.

This litigation itself also makes Tudor's prospects of future employment all the more improbable. Though the Southeastern faculty continues to support Tudor's return, Defendants (or rather, their counsel) have bombarded the public sphere with unfounded attacks on Tudor's credentials, work ethic, and character which make it impossible for her to get a fair review by new employers.

Relatedly, despite the jury verdict, Defendants have doubled-down on their defense (rejected by the jury) that Tudor never merited tenure at Southeastern (see generally ECF No. 270), making it impossible for Tudor to overcome that "black mark" on her record. If Defendants admitted their misdeeds, perhaps Tudor could use that admission to convince a new

employer to take a chance on her. But, to date, Defendants steadfastly insist that they neither admit fault nor allow Tudor to return to the job she earned at Southeastern. In effect, Defendants' litigation position unjustly deprives Tudor of any prospect of a future in her profession.

Defendants' (and their counsel's Office's) outsized control on the pertinent job market also evidences that Tudor has no real prospect of future employment. Tudor was born in Oklahoma and received her doctorate from the University of Oklahoma (Exhibit 3 ¶ 4(d)(ii)). Persons with Tudor's background, roots, and school-network predominantly live and work in Oklahoma (*id.*). Even though Tudor has cast a wide net, her best chance of a new job is at a university in Oklahoma (*id.* ¶ 4(d)(iii)). But finding such a job is impossible under these circumstances.

Absent injunctive relief, Defendants' counsel have made clear that they hold Tudor's complaints at Southeastern and this very litigation against her.⁵ They have even gone so far as to proclaim that Tudor is unfit to teach anywhere,⁶ spuriously maligned Tudor's character,⁷ and advised that they

⁵ *See, e.g.*, ECF No. 270 at 14–15 (arguing that Tudor's invocation of her Title VII rights damaged the Southeastern community because of “side-choosing engaged in by university employees even before Dr. Tudor's separation”); *id.* at 15 (accusing Tudor of being unable to “address work conflicts without resorting to crying discrimination, (as evidence by her accusations and filings at [] Southeastern)”).

⁶ *See, e.g.*, ECF No. 270 at 21 (“she should not be teaching in higher education”); ECF No. 274 at 8 (arguing Tudor is not “fit to teach in a classroom”).

⁷ *See, e.g.*, ECF No. 270 at 17 (“her deliberate deceptiveness and lack of honesty”).

perceive Tudor to be too old to merit an equivalent job to the one she held at Southeastern.⁸ Given those statements and others, it is exceedingly unlikely that if Tudor applies for jobs within the reach of the State of Oklahoma that she will be given a fair chance to prove herself. Moreover, it remains exceedingly unlikely that schools not directly controlled by the State of Oklahoma will ignore the admonishment from the Attorney General's Office—one of the most powerful and prominent divisions of the State—that Tudor is unworthy of hire.

Given the foregoing, awarding Tudor twenty-one years of front pay is appropriate. Long periods for an award of front pay are not unusual where, as is the case here, opportunities for a plaintiff to find an equivalent job are limited. *See, e.g., Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 511–12 (9th Cir. 2000) (approving twenty-two (22) years of front pay to compensate employee for remainder of work life expectancy); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125 (2d Cir. 1996) (approving twenty-years of front pay to compensate employee for remainder of work life expectancy where reinstatement deemed impossible because of hostilities and unlikely that comparable position available with another employer).

⁸ *See, e.g.*, ECF No. 274 at 1 (construing Tudor's age coupled with negative career trajectory Defendants themselves caused as justification to deny Tudor employment).

(5) *Discount award to net present value.* Tudor has reduced the requested front pay to present value by adopting a modified net discount rate.

A net discount rate is a means to adjust a lump sum award, accounting for the difference that investing that award in the market makes as well as the effects of inflation will have on the net amount. To calculate the net discount rate, one takes the prevailing interest rate and subtracts from it the rate of inflation; the resulting figure is the net discount rate. The future lump sum is then multiplied by the net discount rate, thereby reducing the award by a value that approximates the effects of both inflation and investment. *Hoskie v. United States*, 666 F.2d 1353, 1355 n.2 (10th Cir. 1981) (explaining calculation method of net discount rate).

At present, the rate of inflation in the United States is 2.1%. Exhibit 6 (excerpt from Bureau of Labor Statistics report). At present, the prevailing interest rate on Treasury backed marketable debt is 2.004%. Exhibit 7 (U.S. Treasury report showing marketable debt at average of 2.004% as of December 2017). The difference between the rate of inflation and the interest rate is thus -0.096%.⁹ If applied, this negative net discount rate will increase rather than reduce the lump sum award due to Tudor.

To ward off any potential of a windfall, Tudor requests that the Court adopt a modified net interest rate of +1.5% rather than -0.096%. A net

⁹ A negative net discount rate arises where, as is the case currently, interest rates exceed the rate of inflation, but not the rate of growth in wages.

discount rate of +1.5% falls within the range approved by the 10th Circuit in other cases, erroring on the side of a lower rate of reduction based upon the evidence Tudor has submitted showing that she is actually entitled to a net interest rate of -0.096%. *See, e.g., Hull by Hull v. United States*, 971 F.2d 1499, 1511–12 (10th Cir. 1992) (observing that courts typically employ a 1–3% net discount rate).

To assist the Court in its evaluation of Tudor’s front pay request, Tudor has prepared Exhibit 8, which computes the anticipated salary and benefits due to Tudor.

Exhibit 8 sets forth four scenarios allowing for different variables affecting Tudor’s projected income at Southeastern through the remainder of her work life expectancy. Tudor respectfully requests that she be awarded front pay as calculated under Scenario 1, amounting to a front pay award of \$2,032,789.51. Scenario 1 is appropriate because it assumes that Tudor works until the age of seventy-five, receives one additional promotion, teaches one summer and one overload course each year, and takes on administrative duties for a period of ten years. These conservative estimates of Tudor’s earning potential at Southeastern best approximate a fair salary trajectory for Tudor based upon her declaration testimony, that of Dr. Cotter-Lynch, and trends at Southeastern for persons similarly situated to Tudor.

Scenario 1 also aligns with the testimony of Dr. McMillan, who swore under oath that a tenured professorship at Southeastern is valued in excess of \$2 million. *See* Exhibit 9.

C. Propriety of Front Pay Request

Amount is appropriate. The requested amount captures the monetary value of Tudor's career at Southeastern if she had been reinstated and thus fairly compensates Tudor. The record evidence shows that Tudor stands no chance of becoming reemployed in an equivalent job in her field, save for reinstatement at Southeastern, and that Southeastern opposes reinstatement, preferring instead to "pay" Tudor to not return. *See, e.g.*, ECF No. 274 at 8 ("Monetary compensation is how our justice system works best to make parties whole."). Given the particular circumstances of this case, full compensation for the totality of Tudor's remaining career is appropriate.

No evidence that Tudor would have been fired if she had remained at Southeastern. It is possible that Defendants will argue that Tudor would have been terminated for cause if she had remained at Southeastern, and thus front pay should be limited. If Defendants make such an argument, it should be rejected.

In the course of this litigation, no evidence of Tudor's malfeasance or her inability to perform her duties at Southeastern has been uncovered. If Defendants nonetheless argue that they would have legitimately fired Tudor,

they must both proffer evidence of Tudor's malfeasance *and* show that they fire others similarly situated to Tudor in similar circumstances. Defendants' mere argument that they would have fired Tudor, absent both forms of evidence, is not enough to sustain a limitation on front pay. *See, e.g., Sellers v. Mineta*, 358 F.3d 1058, 1064–65 (8th Cir. 2004) (employer seeking limitation on front pay due to after-acquired evidence has burden of establishing that misconduct would, under employer's actual employment practices, preclude reinstatement).

Any argument that Tudor would be unable to perform her job duties at Southeastern and thus front pay should be limited would also be without merit. The jury has finally resolved any questions about Tudor's merit—she earned tenure in the 2009-10 cycle (ECF No. 262 at 1). That finding is wholly supported by the record. As to teaching, the best evidence available shows that tenured English Department faculty, including Drs. Mischo, Althoff, and Cotter-Lynch, attest to Tudor's strengths as a teacher. *See generally* Exhibit 10 (collecting evidence of Tudor's teaching at Southeastern, as evaluated by her peers). (Indeed, even discriminatory actors Drs. Scoufos¹⁰ and McMillan¹¹

¹⁰ In Exhibit 11, the back-dated letter Scoufos placed in Tudor's 2009-10 tenure packet, Scoufos indicates that Tudor is a "generally effective classroom teacher" and teaching is not the purported reason for denying tenure. In Exhibit 12, Scoufos writes, "There is evidence that Dr. Tudor is an effective classroom teacher" and ranks Tudor's teaching as "commendable."

¹¹ In Exhibit 13, McMillan writes that "Dr. Tudor has provided sufficient evidence that she meets the expectation for tenure and promotion in the area of

previously admitted that they had no concerns about Tudor's teaching. Dr. Prus *also* testified that Tudor's teaching is "commendable" and merits tenure [Exhibit 15], and, during the only two classroom observations he conducted of Tudor, Prus lauded Tudor's exemplary classroom teaching [Exhibit 10 at PI00036 and PI00038]). As to scholarship, Tudor's eleven published peer review articles with more on the way (see Exhibit 3 ¶ 3(d)(ii)), are greater in both number and frequency than the publication records of other tenured professors in the English Department.

No after-acquired evidence. It is possible that Defendants will argue that after-acquired evidence¹² bars or should limit front pay. But, Defendants should be judicially estopped from making that argument.

During discovery, in the lead up to trial, and at trial Defendants repeatedly told both Tudor and this Court that they do not have after-acquired evidence. *See generally* Exhibit 16 (collecting examples of Defendants' representations). Defendants should be bound to their past representations. If Defendants attempt to change their position, the Court should apply the equitable doctrine of judicial estoppel so as to preserve the

effective classroom teaching." In Exhibit 14, a transcript of McMillan's 2012 interview with the EEOC, McMillan indicates that Tudor's teaching was adequate for tenure.

¹² After-acquired evidence is any evidence which the employer lacked at the time of the illicit employment action but later seeks to use to contest reinstatement or front pay after liability is proven. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995).

integrity of this process. *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”).

No windfall to Tudor. The requested amount would not give Tudor a windfall. If Defendants had followed the law, Tudor would have life tenure at Southeastern right now. Because Defendants broke the law, Tudor was pushed out into the job market in a vulnerable position, with no avenue to tenure elsewhere and otherwise bleak job prospects.

Tudor’s professional vulnerability is a problem of Defendants’ own making—they must now pay Tudor for the full price of her career. *See Abuan*, 353 F.3d at 1179 (employer’s illicit actions which thrust employee into vulnerable position in job market coupled with employer’s own hostilities precluding reinstatement bar opposition to make-whole front pay as a matter of law). Moreover, the requested award is appropriate because it seeks to return Tudor to the economic position she would have been in if Defendants had not violated Title VII. That is exactly the type of remedy Title VII demands. *Prudential*, 763 F.2d at 1173 (purpose of front pay is to assure that “the aggrieved party is returned to nearly as possible the economic situation [s]he would have enjoyed but for the defendant’s illicit conduct”).

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully requests that the Court order that she be reinstated as a Associate Professor with tenure at Southeastern Oklahoma State University. In the alternative, if reinstatement is deemed infeasible due to Defendants' hostilities, Tudor respectfully asks that she be awarded \$2,032,789.51 in front pay.

Dated: February 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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)