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 REPLY TO DEFENDANTS' OPPOSITION TO REINSTATEMENT OR FRONT PAY

The jury found that, but for discrimination, Dr. Tudor earned tenure at Southeastern. Tudor wants her job back and, in support, has pointed to new evidence which obviates Defendants' prior grounds for opposing reinstatement. Defendants are recalcitrant, but that cannot support denying reinstatement. If reinstatement is deemed infeasible, Tudor should be awarded the entire value of the life-tenure job she earned. Where an employer ruins an employee's career, Title VII requires that she be made whole. Unrefuted evidence shows that due to the lingering effects of Defendants' illicit conduct, Tudor has no prospect of an equivalent job absent

reinstatement. If Tudor cannot have her job back, she should be awarded front pay approximating the compensation she would have received if reinstated. Innocents, like Tudor, deserve no less than this.

I. Supplementation of Newly Available Evidence is Appropriate

The Court should reject Defendants' invitation to ignore the new evidence proffered by Tudor's timely motions to supplement. Defendants cite no specific facts[1] or case law supporting their position that "supplementation is not appropriate at this time" (ECF No. 284 at 6). Unsurprisingly, Defendants dare not speak the true reason for their opposition—that the new evidence both disproves Defendants' past grounds for opposing reinstatement[2] *and* casts doubt as to the accuracy of Defendants' sole piece of evidence against reinstatement, the Prus declaration[3].

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[1] Defendants' imply they had no time to read Tudor's second motion to supplement (ECF No. 282), because it was filed the day before their response was due. Defendants' counsel violate their duty of candor by omitting that the unddrsigned emailed ahead of filing to notify them of the motion and supplements, summarized its significance, *and* that Defendants repeatedly declined to provide a rationale for their opposition let alone request an extension, which would have been agreeable. Moreover, Defendants' neglect to inform the Court that Tudor's misfiling of ECF No. 281 (refiled with corrections as ECF No. 282) was flagged via email within minutes, obviating any need to read both the original (ECF No. 281) and amended motion (ECF No. 282).

[2] The first motion (ECF No. 280), presents unrefuted evidence that there are no hostilities at Southeastern evidenced by Tudor's presentation at a Southeastern hosted conference on March 10, 2018, supported by a declaration from Tudor describing her experience (ECF No. 280-1) and photographs of Tudor at the conference showing her conversing with colleagues (ECF No. 280-3) and *smiling* during her presentation (ECF No. 280-2). The second motion (ECF No. 282), proves Defendants' concern regarding Tudor's publication dry spell—which they previously claimed is the core reason why Tudor is unfit for reinstatement (see ECF No. 270 at 18)—is moot given Tudor's recently published peer review article (ECF No. 282-1). *Contra* Order, ECF No.275 at 3–4 (publication dry spell of 6 years would lead to hostilities from faculty).

[3] The second motion also supplements a job posting at Southeastern for a tenure-track position in the English Department (ECF No. 282-3), which casts into doubt core representations made by Dr. Prus in a declaration (ECF No. 270-15) that this Court heavily relied upon—and assumed to be totally accurate—in initially denying reinstatement. *See* Order, ECF No. 275, at 3–4.

II. Reconsideration of Reinstatement is Warranted

No hostilities. Neither Defendants nor Tudor contend there are present hostilities at Southeastern, let alone "extreme hostilities" of the ilk that must be shown to deny reinstatement. *EEOC v. Prudential*, 763 F.2d 1166, 1172 (10th Cir. 1985). The new evidence Tudor presents, when viewed in light of her earlier proffer and Defendants' anemic rebuttal, makes clear that reinstatement is viable given the warm reception Tudor received (ECF No. 280-1 ¶ 4(a)) from dozens of Southeastern attendees (ECF No. 284-1 ¶4) at the conference. Defendants' charges that Tudor has "manufactured" evidence and that she has an "axe to grind" have no basis in fact and are unsupported by evidence.

Recalcitrance. Defendants ostensibly ask the Court to treat their own recalcitrance as a hostility precluding reinstatement. But binding precedent requires strong evidence of true, licit reasons to deny reinstatement that cannot be derivative of tensions that surface only in the litigation. *See, e.g.*, *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999). Defendants fall woefully short of their burden.

Tudor is qualified to teach at Southeastern. Indeed, there is not one shred of evidence showing that Tudor's cumulative teaching, scholarship,[4] or

[4] Indeed, evidence that Tudor is a productive and able scholar continues to mount. *See* Exhibit 1 (March 26, 2018 email accepting Tudor's paper, subject to final editor approval, for inclusion in forthcoming anthology published by a major public university press).

service disqualifies her. (Disturbingly, Defendants' Brief repeatedly misrepresents Tudor's qualifications.[5]) Moreover, Defendants fail to point to policies, procedures, or comparators showing that they would have grounds to terminate Tudor for cause today if she still worked there—which is exactly what they must prove to avoid reinstatement. *Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir. 2004) (under *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), an employer must show wrongdoing or deficiency would have supported termination even absent discrimination/retaliation and that decision follows actual employment practices). Glaringly, Defendants admit that if Tudor had not been wrongly denied tenure, they would not have sought to strip her of tenure (ECF No. 284 at 20).

Defendants' double-down on their specious claim that Tudor's post-separation work performance can be used to oppose reinstatement. The evidence Defendants point at is after-acquired evidence. *See* ECF No. 279 at 18–19 (explaining this point with reference to precedents). Defendants waived use of after-acquired evidence long ago (*id.*). Their waiver cannot be cured by slapping a new label on the same evidence proffered for the same purpose. *Cf. Raymond v. Mobil Oil Corp.*, 7 F.3d 184, 186 (10th Cir. 1993) (rejecting party's attempt to circumvent precedent and past representations by invoking new label).

[5] As one example, Tudor taught for 7 years at Southeastern, not 6 years. *Contra* ECF No. 284 at 10, *id.* at 13.

Lastly, Defendants' attacks on the credibility and motivations of Tudor, other Southeastern professors including Dr. Cotter-Lynch—a beloved professor, administrator, and recent recipient of the Oklahoma Foundation's Medal for Excellence (Exhibit 2)—are totally unsupported by evidence.

Coworker veto. To date, Defendants' only "evidence" against reinstatement is the Prus declaration, the veracity of which is suspect (see, e.g., ECF No. 282 at 5–7). Even taken at face value, the Prus declaration is insufficient to prove the existence of extreme hostilities. Realizing this deficiency, Defendants invite the Court to create a new rule—that an employer need only point to one person in the workplace who opposes reinstatement. But not one single court has adopted that rule. For good reason. It strains credulity to permit a single person—one of 241 faculty members on campus (ECF No. 284-1¶1)—to veto reinstatement. If this Court ratifies Defendants' rule, it invites recalcitrant employers in every case hereafter to uplift *de minimus* coworker tensions as pretext to punish a wronged employee who wishes to return to work.

III. Front Pay

Tudor's work ethic. Defendants' hollow and unsubstantiated attacks on Tudor's work ethic should be given no weight. The record reflects that Tudor

repeatedly sought out opportunities to work at Southeastern,[6] earned tenure at Southeastern in the 2009-10 cycle (ECF No. 262 at 1 [Question 2]), internally appealed Southeastern's illicit misdeeds, and has diligently sought to mitigate damages. Tudor does not wish to escape work—indeed work is the exact thing she wants most. Tudor's request for front pay is forced by Defendants' opposition to reinstatement and is simply a last-ditch effort to ensure that, in the event she cannot return to Southeastern, she is made economically whole.

Mitigation. Defendants fail to prove Tudor did not mitigate damages. To carry their burden, Defendants must prove that (1) there are positions Tudor could have applied to *and* (2) Tudor failed to exercise diligence. *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). At trial, Tudor proved she mitigated damages up through her start date at Collin College. *See* Exhibit 3 (rejecting Defendants' request for instruction for failure to mitigate and spoliation re mitigation).

Tudor separated from Collin College in late May 2016 and has *diligently* sought work ever since. Precedent commands that Tudor need only seek jobs in her field. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982)

[6] Defendants' argument that Tudor's application for unemployment evidences a poor work ethic is contrary to evidence. Tudor applied for unemployment on a single occasion while at Southeastern and only *after* she was denied the opportunity to teach summer classes (Exhibit 4). *Contra* ECF No. 284 at 11 (accusing Tudor of seeking unemployment instead of seeking summer class work at Southeastern).

(Title VII's duty to mitigate does not require one "go into another line of work, accept a demotion or take a demeaning position"). (Despite this, Tudor has also sought non-tenure-track jobs as well as non-teaching jobs.)

Defendants point to no case showing that Tudor's job applications to more than 100 schools are insufficient. Defendants' farce of pointing to current job ads is also a non-starter. Tudor *is* applying to positions for which she is qualified. *See, e.g.*, ECF No. 279-3 ¶ 3(a)–(d) (describing post-trial mitigation efforts); *id.* ¶4(b) (describing efforts more generally). The problem is, Tudor cannot get *hired* for even roughly equivalent work. ECF No. 279 at 9–11 (explaining Tudor's double-bind and pointing to evidence). The black mark of Southeastern's tenure denial continues to follow Tudor to this day. *Id.* As one example, Southeastern declined to even respond to Tudor's application for a non-tenure job submitted in August 2017 (Exhibit 5).

Defendants claim that ECF No. 284-4 proves Tudor did not mitigate damages, but this fails for the simple reason that this exhibit is inadmissible because Defendants did not produce these documents during discovery. *See* Fed. R. Civ. P. 37(c)(1) (party that fails to abide by 26(e)'s duty to supplement "is not allowed to use that information or witness to supply evidence on a motion"). Indeed, Tudor objected to admission of similar documents when Defendants sprung them on her just days before trial claiming that they had no excuse for failing to timely supplement production (Exhibit 6).

Even if ECF No. 284-4 is admissible, Defendants mislead the Court by claiming it shows Tudor did not seek work. Defendants' subpoenas sought records for a past student or employee by Tudor's name. At most, Defendants uncovered that somewhere around 50 schools of the more than 100 schools to which Tudor applied do not have records responsive to their subpoenas (ECF No. 284 at 15). This is not evidence Tudor did not submit applications. The documents Defendants point to reveal little more than the fruits of Defendants' poor drafting and proof that many schools do not hold onto job applications. The responses variously indicate that the schools found no records because Tudor was never a student or employee there,[7] schools did not maintain records of applications (construing Defendants' poorly drafted subpoena broader than written) past a certain cut-off date and/or were inadvertently destroyed,[8] or schools could not find records but did not indicate no application was filed[9]. Lastly, Defendants neglect their duty of candor (Okla. R. Prof. Conduct 3.3) by failing to disclose that, between Tudor's and the schools' productions, they received hundreds of responsive documents including correspondence (see, e.g., ECF No. 284-4 at 57) and job applications (see, e.g., Exhibit 5) evidencing Tudor's mitigation efforts.

[7] *See, e.g.*, ECF No. 284-4 at 4; *id.* at 13, 18, 27, 32, 35, 51, 58.

[8] *See, e.g.*, *id.* at 8, 19, 23, 41, 43–45, 46–47, 52.

[9] *See, e.g.*, *id.* at 21, 25, 26, 27, 28, 31, 33–34, 36, 37, 38, 39–40, 42, 48, 49, 50, 53, 54, 55, 56, 59, 60–61

Speculativeness. There is considerable evidence provided by Tudor and corroborated by Defendants' witness Dr. McMillan that Tudor's career is worth upwards of $2 million. Unrefuted evidence of this ilk brings Tudor's front pay request beyond speculation. *See Metz v. Merill Lynch*, 39 F.3d 1482, 1494 (10th Cir. 1994) (employee's own testimony can support front pay claim and is not "too speculative"; "uncertainty in determining what an employee would have earned but for discrimination should be resolved against the employer"). Defendants' argument that Tudor failed to present evidence supporting work life expectancy is mertiless. Tudor's sworn, unrebutted testimony (ECF No. 279-3 ¶ 5(a)–(d)) that, if reinstated, she would work until age 75 supports her claimed work life expectancy. *Cf. Metz*, at 1494.

The Court should decline Defendants' invitation to impose a limit on front pay premised on ill-conceived and biased attitudes towards older workers. Cutting Tudor's work life expectancy down to age 62 on the premise that older workers desire to collect social security benefits rather than work flies in the face of lived experience[10] and gives credence to stereotypes of older

[10] Defendants' proposed rule snubs the important contributions of older workers throughout the nation, many of whom thrive in the workplace because they have the protection of life tenure akin to what Tudor earned at Southeastern. Taking the federal judiciary as one example, of Defendants' rule were imposed, 7 out of 9 of our U.S. Supreme Court justices along with 9 out of 11 of the Article III judges sitting in the Western District should be forced to immediately retire because they are 62 years or older. It is gross to even suggest, let alone demand as Defendants do, that the careers of older workers be perniciously discounted rather than fairly evaluated in light of older workers' professionalism, capacity, desire, talent, and drive to serve.

workers which are both distasteful and prohibited by federal law. *See*, e.g., *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422–23 (1985) (employer's mandatory retirement at any age less than 70 unlawful where premised on stereotypes of older workers).

Windfall. No windfall is sought. It is Defendants, not Tudor, who insist the State of Oklahoma pay Tudor to not work at Southeastern. *See, e.g.*, ECF No. 274 at 8 ("Monetary compensation is how our justice system works best to make parties whole.") Apparently, Defendants have a bit of sticker shock, and now argue Tudor's $2 million career (see, e.g., ECF No. 279-9 at 675–76) should be not be paid in full. Yet, Defendants present no credible evidence of what that lower price should be. Defendants also fail to rebut Tudor's evidence, including the 17 exhibits in support of her calculation. Defendants' mere opposition is insufficient. Moreover, there is no arbitrary cap on front pay—the only limit is that the award must compensate the employee for the value of her career where evidence shows it improbable she will obtain comparable employment in her field. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001) (front pay not subject to statutory cap); *Carter v. Sedgwick Cnt., Kan.*, 36 F.3d 952 (10th Cir. 1994) (front pay award must "compensate a victim for the continuing future effects of discrimination until the victim can be made whole") (cleaned up).

Dated: March 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 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
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