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

1. UNITED STATES OF AMERICA, and 2. DR. RACHEL TUDOR Plaintiffs, v. 1. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and 2. THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	)	CASE NO. 5:15-CV-00324-C

PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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I. SUMMARY OF THE ARGUMENT

Defendants' Motion to Dismiss (Doc. 30) wages three attacks on Dr. Tudor's hostile work environment claim. None of Defendants' arguments have merit.

Defendants' contention that Dr. Tudor failed to plead facts supporting hostile work environment cannot be reconciled with the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. Rule 8 only requires that a complaint point to facts, taken as true, that are sufficient to make the claim *plausible*. Dr. Tudor's Complaint in Intervention (Doc. 24) ("Complaint") is replete with allegations that point to a series of acts, courses of conduct, and policies. These allegations are more than sufficient to render Tudor's hostile work environment claim plausible.

Defendants' administrative exhaustion argument lacks merit. In her filings with the U.S. Department of Education ("DOE") and the U.S. Equal Employment Opportunity Commission ("EEOC"), Dr. Tudor pointed to events, dates, policies, and used language from which a hostile work environment claim properly flows. It is of no moment that Dr. Tudor did not use the technical legal phrase "hostile work environment" in her administrative filings. Title VII does not demand that complainants articulate their grievances in exacting legal language.

Lastly, Defendants' invocation of the doctrine of laches fails on its face. The doctrine of laches is an affirmative defense that turns on an intensive factual inquiry and is thus not an appropriate defense to resolve on a motion to dismiss. Moreover, application of laches is not warranted because Defendants have failed to point to specific

facts that support the existence of actual harm or prejudice resulting from a delay which is legally and equitably attributable to Dr. Tudor.

For all the aforementioned reasons Defendant's motion to dismiss should be denied.[1]

II. STANDARD OF REVIEW

Dr. Tudor agrees with the standard of review for motions to dismiss filed pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) & (6) articulated by Defendants.

III. ARGUMENTS & AUTHORITIES

A. HOSTILE WORK ENVIRONMENT CLAIM SUFFICIENTLY PLED

Under Rule 8, a plaintiff need only clearly and succinctly plead facts that, taken as true, give rise to a plausible violation of Title VII. *See Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) *and Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A plaintiff need not make out every element of a hostile work environment claim, she need only allege enough facts to raise a reasonable expectation that discovery will reveal supporting evidence. *See, e.g.*, *Roberts v. Independent School Dist. No. 12, Edmond, Okla.*, civ-13-1245-HE, 2014 WL 1347379, at *2, n.2 (W.D. Okla. Apr. 3, 2014). Dr. Tudor's complaint sets out sufficient detail regarding her work environment to render it plausible.

1. Dr. Tudor pointed to specific facts supporting her hostile work environment claim.

[1] Defendants have not contested in this motion the validity or necessary elements of a Title VII complaint based on gender expression, gender identity, and gender stereotyping, therefore Dr. Tudor will not raise here any arguments regarding these issues.

Dr. Tudor's Complaint did far more than just invoke the phrase "hostile work environment" and append legal conclusions—it exhaustingly alleges events, courses of conduct, and policies that support Tudor's hostile work environment claim. For example, Dr. Tudor specifically alleges events contributing to the hostile work environment which occurred in the 300 day period[2] prior to her first filing dated September 9, 2010, "including but not limited to the daily humiliations caused by the restroom restrictions and misgendering, the maintenance of the discriminatory insurance policy exclusion, dress restrictions, administrators repeatedly interfering with the tenure review process and the constant threat of termination." Doc. 24 ¶ 148. Dr. Tudor also alleges that Southeastern's agents subjected her to a barrage of biased remarks that denigrated her as a transgender woman.[3] Though Title VII does not prescribe a "code of workplace

[2] Because Oklahoma is a deferral state, the correct limitations period is 300 days. *See, e.g., Riley v. Tulsa Cnty. Juvenile Bureau ex rel. Tulsa Cnty. Bd. of Comm'rs,* 421 Fed.Appx. 781, 783 (10th Cir. 2010) (unpublished) (*citing* 42 U.S.C. § 2000e–5(e)(1)).

[3] For instance, Dr. Tudor alleges that early on in her transition that two of Defendants' agents made statements to her directly, or reported comments made by others to her, which expressly denigrated transgender persons. For example, she alleges that during Summer 2007 a Southeastern human resources employee told her that Dr. McMillan wanted her terminated from Southeastern because of her "transgender lifestyle." *See* Doc. 24 ¶ 40. Dr. Tudor also alleges that shortly after she started to present as female during the 2007–08 academic term that Ms. Jane McMillan, then the director of Southeastern's Counseling Center, told her that Dr. McMillan considered transgender people to be a "grave offense to his [religious] beliefs." *See* Doc. 24 ¶ 42. In that same conversation with Ms. McMillan, Dr. Tudor was told she should take safety precautions when she was on Southeastern's campus because unnamed persons were openly hostile towards transgender people. *Id.* Dr. Tudor also alleges that she was warned by Southeastern's human resources personnel that if she used a multi-stall women's restroom on campus that students or faculty would complaint. *See* Doc. 24 ¶ 47.

Verbal disparagement took on a different form from August 2009 onward. For example, Dr. Tudor alleges that starting in Summer 2009, Dean Scoufos began to misgender her. *See* Doc. 24 ¶ 80 (alleging misgendering started during an August 2009

conduct," *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005), it is well recognized that a barrage of animus ridden statements, combined with other allegations, is sufficient to support a hostile work environment claim. *See, e.g.*, *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1413–14 (10th Cir. 1997) (holding that aggregation of other hostilities with "[a]t least three . . . disparaging remarks directed at Plaintiff were severe enough to affect a reasonable person's identity as a woman").

Dr. Tudor also alleges many incidents that evidence that Southeastern's administration treated Dr. Tudor less favorably than her nontransgender colleagues.[4]

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meeting with Dean Scoufos); *id.* ¶ 81 (defining and explaining misgendering). Misgendering of the ilk Dr. Tudor alleges is a hallmark of transgender sex discrimination. *See, e.g.*, *Jamison v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *11–*12 (Apr. 1, 2015) (holding that repeated references to a transgender woman with male pronouns by a coworker gives rise to a claim of hostile work environment). *Cf. Myers v. Cuyahoga County, Ohio*, 182 Fed.Appx. 510, 520 (6th Cir. 2006) ("calling a transsexual or transgendered person a "he/she" is a deeply insulting and offensive slur, and we agree that using that term is strongly indicative of a negative animus towards gender nonconforming people").

[4] For example, Dr. Tudor alleges that she was directed by Southeastern's human resources office to not use the women's restroom located adjacent to her office (Doc. 24 ¶ 45), and that no other faculty member was given a similar instruction (Doc. 24 ¶ 48). Dr. Tudor alleges that she was given special counseling on her attire, including a special instruction to not wear "short skirts" (Doc. 24 ¶ 64), and that no other member of the faculty was given similar counseling (Doc. 24 ¶ 65) despite the fact that nontransgender female faculty routinely wore short skirts (Doc. 24 ¶ 66). She also alleges unequal treatment throughout the tenure and promotion process. For example, she alleges that Dean Scoufos declined to report her complaint of sex discrimination to Southeastern's Affirmative Action Officer (Doc. 24 ¶ 82); Vice President McMillan refused to discuss his rationales for opposing her application for promotion and tenure, and that in the previous academic term Dr. McMillan chose to meet with a similarly situated nontransgender English professor and gave him feedback on how to improve his portfolio (Doc. 24 ¶ 92); after filing a grievance with President Minks (Doc. 24 ¶ 93) and receiving

Though not all the unequal treatment alleged was explicitly gendered in nature, Dr. Tudor did expressly allege that she was treated unequally because of her sex and thus these incidents properly support her hostile work environment claim. Doc. 24 ¶ 131–32. *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994) (*citing Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (holding that any unequal treatment, even if not gendered in nature, perpetrated because of sex, can give rise to hostile work environment claim)).

Dr. Tudor also alleges that Dr. McMillan, a man whom had previously expressed animus towards Tudor and transgender people generally (*see, e.g.*, Doc 24 ¶¶ 40, 42), subjected Tudor's application for tenure and promotion to heightened scrutiny during the 2009–10 application cycle.[5] As pled, Dr. McMillan's superficially "gender neutral"

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a favorable ruling from the Faculty Appellate Committee ("FAC") (Doc. 24 ¶ 94), President Mink's designated agent, the Assistant Vice President for Academic Affairs (Doc. 24 ¶ 95), both declined to follow the FAC's recommendation *and* failed to notify Dr. Tudor of the decision within the ten workday deadline prescribed by Southeastern's policy (Doc. 24 ¶ 96).

[5] Among other things, Dr. Tudor alleges that Dr. McMillan opposed her application for spurious reasons—claiming that her record of "research/scholarship" and "university service" were deficient. *See* Doc. 24 ¶ 100. She also alleges that her qualifications were comparable if not superior to the qualifications of at least three similarly-situated nontransgender English professors whose applications were approved for tenure during Tudor's time at Southeastern. *See* Doc. 24 ¶ 101. For example, Dr. Tudor had a greater number of peer-reviewed publications than at least one other successful tenure applicant. *Id.* Indeed, Dr. Tudor's scholarly contributions were lauded by her peers at Southeastern. Doc. 24 ¶ 120 (noting that Tudor was awarded with the Faculty Senate Recognition Award for Excellence in Scholarship during the 2010–11 academic year). Despite her recognized contributions to her field, Dr. McMillan sent a letter to the FAC during the 2010–11 academic year claiming that Dr. Tudor's portfolio was the "poorest portfolio [he had] ever review in the 20 years" he had worked at Southeastern. *See* Doc. 24 ¶ 109. Dr. McMillan's statements stand in stark contrast to those of one of Dr. Tudor's colleagues, who claimed in a letter to the FAC that Tudor

objection to Dr. Tudor's application, when viewed in context with his past statements evidencing animus towards Dr. Tudor and other transgender persons, is sufficient to sustain a hostile work environment claim. *See O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999) ("Facially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly gender-discriminatory conduct."). *See also Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 960 (10th Cir. 2012); *Chavez,* 397 F.3d at 833. Indeed, heightened scrutiny of the ilk Dr. Tudor alleges is a hallmark of transgender discrimination. *See, e.g.*, *Barnes v. Cincinnati,* 401 F.3d 729, 738 (6th Cir. 2005) (finding that heightened scrutiny of transgender officer by nontransgender supervisor was perpetrated with the intent of building a poor performance record to justify adverse employment action).

In addition to pointing to discrete acts, Dr. Tudor's Complaint also alleges the existence of discriminatory policies, some of which were crafted with discriminatory intent and some of which had a disparate impact upon transgender persons.[6] As pled, the

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"ha[d] published more research than any other member of the [English] department, tenured or untenured." *See* Doc. 24 ¶ 111.

[6] Dr. Tudor alleges that Defendants' maintained a health insurance plan that expressly excluded medically necessary care to transgender persons (Doc. 24 ¶ 68); that the Plan's exclusion had the effect of limiting treatments such as exogenous hormones and routine blood tests on the basis of one's sex (*id.*); that under the Plan, nontransgender persons could seek coverage for medically necessary exogenous hormone treatment and blood level tests which were otherwise denied to transgender persons (*id.* ¶ 69). Defendants do not deny the existence of the transgender exclusion. *See* Southeastern Answer, Doc. 28 ¶ 67 (admitting the existence of a transgender exclusion in the health plan); RUSO Answer, Doc. 29 ¶ 67 (same). It is well settled that an employer provided

environment was not merely affected by the fact that Dr. Tudor was told "one time" not to wear certain gendered clothing, not to use gender-appropriate restrooms, or denied appropriate health care (Doc. 30 at 4). These policies were binding on Dr. Tudor and their effects were felt daily. A hostile work environment is plausible when predicated in whole or in part on policies that have a disparate impact upon members of a protected status. *See, e.g., Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006) *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Under 10th Circuit precedent, allegations of policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim. *See Maldonado*, 433 F.3d at 1304. Contrary to Defendants' contentions, Dr. Tudor need not plead that policies with a disparate impact were specifically crafted against members of a protected status. *Id.*

Taken together, Dr. Tudor's Complaint does not simply invoke legal conclusions or labels, it points to a combination of discrete acts and policies which, taken as true, are more than sufficient to buttress her hostile work environment claim, as explained by the Supreme Court:

> "A plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that

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health plan that limits coverage of benefits on the basis of sex violates Title VII. *See generally Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Dr. Tudor also alleges that Defendants' maintained a restrictive restroom policy that prohibited her from utilizing restroom facilities that comported with her gender identity from the onset of the 2007-08 academic year through her termination in May 2011 (Doc. 24 ¶¶ 53–56); that that the restrictive restroom policy was crafted by human resources because Defendants feared complaints from students and faculty (Doc. 24 ¶ 51); and that because of the policy Tudor was often times was unable to relieve herself during her work-day (Doc. 24 ¶ ¶ 54, 55) and as a result Tudor often experienced physical discomfort and humiliation (Doc. 24 ¶ 56).

> regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."

Johnson, 135 S.Ct. at 347.

2. Dr. Tudor's allegations point to incidents and policies that are sufficiently severe or pervasive to be deemed plausibly hostile.

Defendants suggest that Plaintiff's environmental claim is limited only to the "one time" she was told not to wear certain gendered clothing and the "one time" she was told not to use gender-appropriate restrooms (Doc. 30 at 4), ignoring the multitude of facts and circumstances set out in Dr. Tudor's Complaint. Case law teaches that pervasiveness *or* severity should be measured by examining the totality of the circumstances, not the piecemeal assessment of discrete acts and individual policies that Defendants proffer. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) ("But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances); *id.* at 23 (existence of hostile work environment not to be divined from a "mathematically precise test").

Taken together, Dr. Tudor's allegations demonstrate that it is plausible that her work environment was hostile. Indeed, Tudor's allegations concerning disparaging statements and misgendering, heightened scrutiny, disparate treatment, the special dress code, and the restroom and insurance policies rise far above petty slights or routine "job stress." *See Trujillo v. Univ. of Colo. Health Sciences Center*, 157 F.3d 1211, 1214 (10th Cir. 1998). These allegations are also more than "[c]asual or isolated manifestations of

discriminatory conduct, such as a few sexual comments or slurs . . . ." *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1175 (10th Cir. 1996) (*citing Hicks*, 833 F.2d at 1414). Indeed, Dr. Tudor's allegations are plainly distinguishable from the authorities Defendants relies upon. For example, in *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365–66 (10th Cir. 1997) the plaintiff pointed to only five "offensive comments." *Morris v. City of Colorado Springs*, 666 F.3d 654, 669 (10th Cir. 2012) is also inapposite.[7]

3. Rule 8 does not require exactitude.

Defendants' contention that Dr. Tudor's complaint fails to satisfy Rule 8 because some allegations lack exact dates or names fails on its face. Defendants complain that Dr. Tudor alleges approximate dates and/or provides a description of an individual who made statements to her over the phone and does not provide their exact name. *See* Doc. 30 at 4. By no means does either Title VII or Rule 8 require this level of exactitude in pleading. Indeed, the 10th Circuit has observed that Rule 8 is satisfied in hostile work environment claims even where imprecise dates are alleged. *Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, 334 Fed.Appx. 914, 921 (10th Cir. 2009) (unpublished). The reason for this is plain—imprecise dates and, by extension, generalized descriptions rather than names of individuals, are sufficient to put defendants on notice of the facts upon which a

[7] In *Morris*, the employee alleged a handful of distasteful incidents occurred over a three month period, after the employee complained, the employer placed the employee and problematic team members in a "team building" program and the employee was later removed from her environment after she issued a formal complaint. These facts are in no way similar to those in the case at bar. Dr. Tudor alleges a pervasive campaign of discrimination that stretches from Summer 2007 through her termination on May 31, 2011. It touched on everything from her inability to use the restroom when she needed to relieve herself, to her inability to reap the benefits of Defendants' established grievance procedures, to the events leading up to and resulting in her termination on May 31, 2011.

plaintiff relies. Title VII requires no more than this. *Johnson*, 135 S.Ct. at 347. Because the nature of a hostile work environment is that the workplace is permeated with bias, and that the bias endures for a period of time, the exact dates and names attendant to particular allegations is not required.

Indeed, it is telling that Defendants had little difficulty proffering answers to the same allegations they allege were insufficiently specific under Rule 8. *See, e.g.,* RUSO Answer, Doc. 29 ¶ 45 (denying, without claiming insufficient knowledge or information to admit, that an employee of Southeastern's human resources office instructed Tudor to not use the multi-stall women's restroom proximate to Tudor's office); Southeastern Answer, Doc. 28 ¶ 45 (same); RUSO Answer, Doc. 29 ¶ 51 (denying, without claiming insufficient knowledge or information to admit, that Tudor was instructed by human resources employee to not use women's restroom); Southeastern Answer, Doc. 28 ¶ 51 (same); RUSO Answer, Doc. 29 ¶ 67 (admitting maintenance of transgender insurance exclusion); Southeastern Answer, Doc. 28 ¶ 67 (same).

4. Subjective and objective elements both pled and adducible from pleadings.

Defendants' miscomprehend the requisite degree of subjective and objective hostility that must be demonstrated to render a hostile work environment claim plausible. As to the subjective prong, Dr. Tudor expressly pled that many of the discrete incidents and policies that constitute her hostile work environment claim were subjectively hostile.[8]

[8] *See, e.g.*, Doc. 24 ¶¶ 55–56 (alleging physical discomfort and humiliation resulting from inability to regularly utilize restroom when needed); *id.* ¶ 58 (alleging profound guilt and humiliation when Tudor had to apologize to persons with disabilities when she inconvenienced them by using the single-stall restroom); *id.* ¶ 146 (alleging

This is sufficient to render it plausible that Dr. Tudor believed the environment was a hostile one. *Morris*, 666 F.3d at 654 (pointing to acts or policies which plaintiff alleges altered status of work environment is sufficient to satisfy subjective prong). Defendants draw a rule from *Morris v. City Colorado Springs*, 666 F.3d 654 (10th Cir. 2012) which does not exist. Namely, *Morris* does not stand for the proposition that an employee must complain about each and every incident constituting a hostile work environment claim within days of its occurrence for the subjective prong to be satisfied.[9] *Morris* did not reach the issue of subjectivity. *Morris*, 666 F.3d at 669 ("we need not definitively opine on this matter"). However, even if Tudor must establish that she complained about core incidents upon which her hostile work environment claim is premised, it is clear from her Complaint that she did just that.[10]

Dr. Tudor also alleged facts that make it plausible that a reasonable person would find her work environment to be hostile, thereby satisfying the objective prong. *Harris*, 510 U.S. at 21 (holding that a work environment is "objectively hostile" where a

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humiliation resulting from insurance exclusion); *id.* ¶ 146 (alleging humiliation resulting from insurance exclusion); *id.* ¶ 149 (alleging that Dr. Tudor found the working environment to be abusive or hostile).

[9] Plaintiff/Intervenor omits any discussion of notice under *Faragher-Ellerth*, as it is not raised here by Defendants.

[10] *See, e.g.*, Doc. 24 ¶ 82 (alleging Tudor made a oral complaint about discrimination in August 2009); *id.* ¶ 93 (alleging filing of grievance and request for hearing with the FAC in February 2010); *id.* ¶¶ 104–05 (alleging filling of grievance with the FAC in August 2010); *id.* ¶ 114 (alleging filling of sex discrimination complaint with Southeastern's Affirmative Action Officer); *id.* ¶ 108 (alleging filing of grievance with the FAC in October 2010); *id.* ¶¶ 6, 115 (alleging filing of September 2010 complaint with DOE); *id.* ¶ 116 (alleging supplementation of complaint previously filed with Southeastern's Affirmative Action Officer in or about October 2010); *id.* ¶ 7 (alleging supplementation of filings on or about July 12, 2011 with EEOC *after* termination).

"reasonable person would find [it] hostile or abusive"). Contrary to Defendants' contentions, a reasonable person's assessment of hostility is not centered on the humiliation due to any one discrete allegation on which the hostile work environment claim is predicated. *See Thomas v. Avis Rent a Car*, 408 Fed.Appx. 145, 156 (10th Cir. 2011) (unpublished) ("In considering whether a reasonable person would find his work environment hostile, we have said 'the real impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used'.") (*quoting Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998)). As one example from the Complaint, taking Dr. Tudor's allegations as true, it is plausible that a reasonable person would find a workplace where one cannot guarantee access to a restroom when needed (Doc. 24 ¶ 55) and resultant discomfort and humiliation (Doc. 24 ¶ 56) as inhospitable. Indeed, the physical and mental strain that Dr. Tudor alleges she experienced daily simply due to the restroom policy alone is enough for a "rational factfinder" to conclude that Dr. Tudor experienced more than a handful of sporadic slights. *See Hernandez*, 684 F.3d at 958 (holding that allegations pointing to more than sporadic slights are sufficient to satisfy objective prong).

B. ADMINISTRATIVE REMEDIES WERE EXHAUSTED

Defendants argue that because Dr. Tudor did not include the phrase "hostile work environment" in her administrative filings with the DOE and EEOC, that she has failed to satisfy Title VII's administrative exhaustion requirement. Not so. Title VII's exhaustion requirement does not demand that complainants exactingly plead

discrimination in technical, legal terms. Title VII merely requires that administrative filings set forth a general description of discriminatory acts and/or policies, and that one or more of those acts and/or policies occur or be maintained during the limitations period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116–17 (2002) (*citing* 42 U.S.C. §2000e-5(e)(1)); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1183–84 (10th Cir. 2003). Dr. Tudor clearly satisfied this standard.

Title VII does not specify the form or content of filings, providing only that "charges shall be made in writing under oath or affirmation." 42 U.S.C. 2000e-5(b). *See also EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984) (holding that Title VII "prescribes only minimal requirements pertaining to the form and content of charges of discrimination"). In all other respects, Congress expressly left the details concerning the content of filings to the EEOC, stating that filings "shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). The pertinent EEOC regulation requires only a "clear and concise statement of the facts," not an expanded statement of all facts and circumstances. 29 C.F.R. 1601.12(a)(3). Thus, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b). *See also Shell Oil*, 466 U.S. at 62 n.11 (expressly rejecting the interpretation of some earlier courts that required aggrieved individuals to "se[t] forth the facts upon which [the charge is] based"). *See also Jones v. U.P.S., Inc.*, 502 F.3d 1176, 1184 (10th Cir. 2007) (implicitly recognizing the validity of §1601.12(b) and further holding that an aggrieved employee need not

even file an actual charge if she supplies the EEOC with sufficient information in another form that the EEOC then treats as a charge). Noticeably absent from the EEOC's regulation is any express requirement that charging parties include legal labels such as "hostile work environment" in the filings.

In parallel with the EEOC's lenient standards are 10th Circuit precedents that recognize that, though Title VII claims must flow from administrative pleadings, such pleadings should be liberally construed. *See, e.g.*, *Green v. Donahoe*, 760 F.3d 1135, 1142 (10th Cir. 2014); *Jones*, 502 F.3d at 1186 (10th Cir. 2007); *MacKenzie v. City and Ctny. of Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005) (similar holding in ADA context); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1195 (10th Cir. 2004) (similar holding in ADEA context). Liberal construal of filings is all the more imperative where pleadings are filed, as is the case with the filings of Dr. Tudor, without the assistance of counsel. *See Donahoe*, 760 F.3d at 1142 (*citing Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir. 2002) ("We are required to construe appellant's EEOC charges with the utmost liberality since they are made by those unschooled in the technicalities of formal pleading.")).

With regard to hostile work environment claims specifically, Title VII merely requires that the charge(s) set forth a general description of discriminatory acts and/or policies, and that one or more of those acts and/or policies occur or be maintained during the limitations period. *See Morgan*, 536 U.S. 101, 116–17 (*citing* 42 U.S.C. §2000e-5(e)(1)); *Davidson*, 337 F.3d at 1183–84. Dr. Tudor clearly satisfied this standard. In her administrative filings (filed herewith in the Declaration of Dr. Rachel Tudor in Opposition to the Motion to Dismiss as Exhibits A, B, and C) (hereinafter referred to as

"Declaration"), Dr. Tudor specifically points to facts which plainly paint a picture of a workplace permeated with hostility because of sex. For instance, Dr. Tudor also pointed to her protected status.[11] Tudor's filings also point to acts that span the course of several years as well as the existence of institutional policies that were enforced over a period of years.[12] Taken on their face, these facts were sufficient to put the EEOC on notice of the viability of a hostile work environment claim.

It is of no moment that Dr. Tudor did not invoke the term "hostile work environment" in her filings, since the allegations in her filings plainly fall under that label. A hostile work environment claim flows from filings that point to incidents and/or policies that discriminate based upon a protected status. *Anderson v. Clovis Mun. Schs.*, 265 Fed.Appx. 699, 706 (10th Cir. 2008) (unpublished) (holding that hostile work environment claim reasonably flows from charge which identifies the complainant's protected status and points to discriminatory incidents occurring over a period of time). It was thus not necessary for Dr. Tudor to use the "magic words" of "hostile workplace

[11] *See, e.g.*, Declaration, Exhibit A at 4 (claiming discrimination on the basis of sex generally); Declaration, Exhibit B at 2 (claiming status as transgender woman); Exhibit C at 1–2 (claiming harassment based on gender).

[12] *See, e.g.*, Declaration, Exhibit A at 2 (referencing "odious bullying," "hostile attitude arising from discrimination," alleging that Dr. Scoufos demanded that Tudor withdraw her tenure application immediately without giving Tudor opportunity to think the decision over); *id.* at 4 (alleging generally that the administration took a "adversarial and hostile demeanor" toward Tudor because of her protected status and alleging white male colleagues were treated more favorably than Tudor during the tenure and promotion process during 2009–10 academic year); Declaration, Exhibit C at 1 (alleging discriminatory restroom policy listing a date range of 1 ½ years, using the terms "harassed" and "harassment," and alleging Tudor was told by human resources employee that Dr. McMillan had searched for reasons to terminate Tudor because she is transgender); *id.* at 2 (alleging Tudor's tenure application was spuriously denied in 2009).

environment" in order to plead such a claim. *Kalka v. Nat'l Am. Ins. Co.*, No. CIV-07-708-C, 2007 WL 4287617, at *2 (W.D. Okla. Dec. 5, 2007). *See also Hunt v. Riverside Transp., Inc.*, 539 Fed.Appx. 856, 859 (10th Cir. 2013) (unpublished) (observing that a hostile work environment claim is adequately exhausted where, even if not the phrase "hostile work environment" is absent from filings, the filings *describe* a hostile work environment).

As to her Complaint, Dr. Tudor pled that her filings with the DOE and the EEOC (Doc. 24 ¶¶ 6–7) included a hostile environment component (*id.* ¶ 115) ("This complaint specifically referenced "odious bullying" "hostile attitude arising from discrimination" and "adversarial and hostile demeanor toward a Native American woman."). This is sufficient to render her hostile work environment claim plausible.

It should be noted that Defendants contradict their own admissions,[13] alleging in their Motion to Dismiss that "[n]owhere in [her EEO claim] did Plaintiff allege that she was subject to a hostile work environment because of her gender." Doc. 30 at 7. Curiously, Defendants argue that because a single transmittal letter from the DOE, attached to its brief as Exhibit 1, fails to mention the term "hostile work environment" that Dr. Tudor failed to exhaust her claims before the EEOC. However, there is no case law, statute, or regulation that teaches that exhaustion turns on what issues the EEOC or any other agency highlights for respondents in transmittal letters. Indeed, the 10th Circuit

[13] Both Defendants "admit[] Dr. Tudor filed a discrimination complaint with DOE as alleged in Paragraph 115." RUSO Answer, Doc. 29 ¶ 115; Southeastern Answer, Doc. 28 ¶ 115. *See* Doc. 24 ¶ 115 ("This complaint specifically referenced "odious bullying" "hostile attitude arising from discrimination" and "adversarial and hostile demeanor toward a Native American woman.").

has recognized that exhaustion turns on what issues flow from the administrative filings, not issues the EEOC discretely communicates to Defendants in other transmittals. *See, e.g.*, *Jones,* 502 F.3d at 1185.

Lastly, Dr. Tudor notes that it is unclear whether Defendants are entitled to raise exhaustion as an affirmative defense on a motion to dismiss. The 10th Circuit has not yet explicitly decided in a published opinion what effect, if any, *Jones v. Bock,* 549 U.S. 199 (2007) has in the Title VII context.[14]

Because Dr. Tudor's EEOC charge met the minimal general description requirement of EEOC regulations and Dr. Tudor sufficiently alleged the same types of discrimination in her filings with the DOE and EEOC that she complained of in her Complaint in Intervention, Dr. Tudor sufficiently exhausted administrative prerequisites to suit.

C. DOCTRINE OF LACHES SHOULD NOT BE APPLIED

The doctrine of laches is an affirmative defense that turns on intensive factual inquiry and thus is not an appropriate issue to be decided on a motion to dismiss. *See Patton v. Jones*, 2006 WL 2246441, at *4 (W.D. Okla. Aug. 4, 2006) ("The laches defense raises fact questions regarding the existence of any delays, the reasons for any

[14] Title VII is silent on the issue of whether exhaustion must be pled by the plaintiff or is an affirmative defense. A majority of circuits agree that it is an affirmative defense. *See, e.g.*, *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *Salas v. Wisc. Dep't of Corr.*, 493 F.3d 913, 922 (7th Cir. 2007); *Little v. United States*, 794 F.2d 484, 487 n.2 (9th Cir. 1986); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). The 10th Circuit has only addressed this issue directly in unpublished decisions. *See, e.g.*, *Asebedo v. Kansas State Univ.*, 559 Fed.Appx. 668, 672 (10th Cir. 2014) (unpublished); *Martinez v. Target Corp.,* No. 09–2112, 2010 WL 2616651, at *3 n. 2 (10th Cir. 2010) (unpublished).

such delays, the prejudice created by any delays, and the balance of equities. ***These issues cannot be determined on a motion to dismiss***.") (emphasis added). Even if the doctrine of laches *could* be properly raised at this stage, application is nevertheless improper because Defendants have failed to point to facts supporting a finding of inexcusable delay resulting in actual harm or prejudice that is legally and equitably attributable to Dr. Tudor.

Application of the doctrine of laches turns on the recognition that "stale claims" present difficulties for courts and parties, to wit, "as time elapses between the litigation and the events at issue . . . [m]emories fade; witnesses cannot be located or pass away; documentation becomes inaccessible and more difficult to interpret." *Hutchinson v. Pfeil*, 105 F.3d 562, 565 (10th Cir. 1997). Laches consists of two elements: (a) inexcusable delay in instituting a suit and (b) prejudice or harm to Defendants flowing from that delay. *Alexander v. Philips Petroleum Co.*, 130 F.2d 593, 605 (10th Cir. 1942). Defendants bear the burden of demonstrating that both elements are satisfied *and* that application of the laches comports with principles of law and equity. *See Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945). Defendants have failed to satisfy their burden for at least three reasons.

1. No delay in prosecuting administrative claims.

Application of laches to this suit is inappropriate because Defendants have failed to demonstrate that Dr. Tudor inexcusably delayed administrative prosecution of her claims. Defendants have pointed to no facts that support a finding that Dr. Tudor inexcusably delayed initiation of the administrative proceedings. Indeed, Dr. Tudor's Complaint reveals, on its face, that there was no delay. Dr. Tudor filed a timely charge

with the DOE on September 9, 2010, nearly eight months prior to her separation from Defendants. *See* Doc. 24 ¶ 6. Dr. Tudor was terminated on May 31, 2011. *See* Doc. 24 ¶ 119. On or about July 12, 2011—approximately forty-two days after her termination—Dr. Tudor supplemented her charge with the EEOC. *See* Doc. 24 ¶ 7. Approximately two months after her termination, Dr. Tudor supplemented her EEOC charge again. *See* Declaration, Exhibit C.

It is inappropriate to seek application of laches to a hostile work environment claim on the theory that an aggrieved employee should have complained about each and every discrete act and policy, as they occurred. As a preliminary matter, Title VII prohibits sex discrimination and thereby places an affirmative burden on employers to stay within the metes and bounds of the statute. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (recognizing employers' "affirmative obligation to prevent violations"). The fact that Defendants now apparently wish they had not violated the statute is of no moment—it was their responsibility to take steps to ensure compliance. *See, e.g.*, *Burlington v. Industries v. Ellerth*, 524 U.S. 742, 765 (1998) (holding employer liable for creation of hostile work environment where employer fails to exercise reasonable care to prevent and correct supervisor's behavior).

Moreover, it also belies the very nature of a hostile work environment claim to argue that one must complain of each and every discrete act and/or policy giving rise to the claim as it occurs. "Hostile work environment claims are different in kind from discrete acts." *Morgan*, 536 U.S. at 115. The difference lies in the fact that a hostile work environment claim is composed of a series of acts and/or policies, occurring over a period

of time, which collectively "constitute one 'unlawful employment practice'." *Morgan*, 536 U.S. at 116–17 (*citing* 42 U.S.C. §2000e-5(e)(1)). As articulated in her Complaint, the incidents and policies that Dr. Tudor alleges are actionable because, *taken together*, they created a hostile work environment. Doc. 24 ¶¶ 130–59. Additionally, it is well settled that a hostile work environment does not occur on any particular day, thus it is absurd that Defendants argue that Dr. Tudor should or even could have complained of the hostile work environment at some unspecified earlier date. *Morgan*, 536 U.S. at 115 ("The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.") (quotations omitted). Though Dr. Tudor need not complaint of constitutive elements of the hostile work environment prior to the filing deadline, the Court may take notice of allegations in Dr. Tudor's Complaint showing that, on several occasions before *and* after her termination, she sought redress of key components of her hostile work environment claim.[15]

To the extent that Defendants rely on *U.S. ex rel. Arant v. Lane*, 249 U.S. 367 (1919), a ninety-six year old Supreme Court case narrowly focused on the vagaries of the writ of mandamus, such reliance is misplaced. Though Dr. Tudor seeks reinstatement as a remedy for her wrongful termination claim (reinstatement *is not* sought as a remedy to the hostile work environment claim), the similarities between Dr. Tudor and the realtor in *Lane* end there. Unlike the realtor, Dr. Tudor complained of the discrimination both *before* and *after* her termination.

[15] *See* citations and annotations, *supra* note 10.

2. Tudor did not delay filing her private suit.

As to Dr. Tudor's initiation of this litigation, she moved to intervene and join claims on April 9, 2015—a mere *ten days* after the United States filed its suit. Under the statute, Dr. Tudor was not privileged to file her private suit until the EEOC either issued a Notice of Right to Sue ("NORTS") on her sex discrimination claims (which encapsulate her hostile work environment claim as it is premised on discrimination because of sex) *or* the United States filed suit. As Defendants helpfully point out, Dr. Tudor did not allege that a NORTS was issued. *See* Doc. 30 at 7, n.4. This is because no NORTS was issued on Dr. Tudor's sex discrimination allegations from which her hostile work environment claim flows. Because no NORTS was issued, Dr. Tudor could not file her private suit until after the United States filed its suit on March 30. Within ten days of the Untied States filing suit, Dr. Tudor invoked her statutory right to intervene and join claims. *See* 42 U.S.C. §2000e-5(f)(1) (providing the aggrieved the right to intervene in suit brought by the United States); Fed. R. Civ. P. 24(a)(1) (right to intervene where right is guaranteed by statute); Fed. R. Civ. P. 18(a) (right to join claims against defendants). This is not the stuff of delay.

To the extent that Defendants argue that Dr. Tudor should have requested a NORTS rather than intervening after the United States filed suit, such an argument is unsupported by case law. The 10th Circuit recognizes that responsibility for concluding administrative investigations, issuing NORTS, and determinations as to whether the federal government will litigate in a particular case lies with the EEOC and Department of Justice. *See generally Hiller v. Oklahoma ex rel. Used Motor Vehicle and Parts Com'n*,

327 F.3d 1247 (10th Cir. 2003). Further, courts are in agreement that complainants need not push the EEOC to issue a NORTS before the administrative investigation is complete. *See, e.g.*, *Wyckoff v. Loveland Chrysler-Plymouth, Inc.*, No. 07-cv-01639-REB, 2008 WL 927664, at *3 (D. Colo. Apr. 3, 2008) ("Plaintiff was entitled to allow the case to remain with the agency for further administrative review."). Sister circuits are also in agreement that a complainant should not be punished for government delay. *See, e.g.*, *Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985) ("EEOC delays are not to be charged against private plaintiffs and . . . complainants are not required to terminate the administrative process by requesting a notice of right-to-sue."); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532–33 (11th Cir. 1984) ("The private remedy allowed by [section 706(f)(1)] is only an alternative method to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forego the alternative and electing instead to legislatively and judicially favored method of relying on the administrative processes of the EEOC.") (quotations and citations omitted); *Holsely v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984) ("decision to rely on the [EEOC's] administrative process before initiating a private suit is not inexcusable delay"), *cert denied*, 470 U.S. 1028 (1985); *Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983) (holding that charging party not penalized where EEOC delayed issuance of right-to-sue notice for twenty-one months after reasonable cause determination).

3. No actual harm or prejudice has been demonstrated.

Defendants chief complaint appears to be that Dr. Tudor did not immediately complain of "tortious conduct" in 2007 and that such delay "allow[ed] the passage of

time to potentially destroy of obfuscate evidence favorable to the University." Doc. 30 at 10. Defendants further complain that the "University is now forced to muster its defenses and is deprived of the ability [to] address these concerns in a timely fashion that could have potentially averted litigation altogether." *Id.* Neither point is sufficient to support application of laches.

Supposing that Defendants could demonstrate delay for which Dr. Tudor is personally responsible, mere delay, without demonstrating *actual* harm or prejudice, is not enough to warrant application of laches. *Garner v. Yellow Freight System, Inc.*, 19 Fed.Appx. 834, 836 (10th Cir. 2001) (unpublished). It is axiomatic that for laches to be applied, actual harm or prejudice must be demonstrated. Mere conjecture is insufficient. *EEOC v. Gard Corp.*, 795 F.Supp. 1066, 1070 (D. Kan. 1992) ("Generalized allegations of harm from the passage of time do not amount to a showing of prejudice sufficient to invoke the doctrine of laches.").

Indeed, there is no reason to believe that Defendants' are actually prejudiced. *See, e.g.*, *EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 84 (3d Cir. 1984) (holding that prejudice must be shown by the party asserting laches). Defendants' failure to point to specific witnesses or exculpatory evidence whose lost is attributable to the purported "delay" in prosecution speaks volumes.[16]

[16] Defendants' reliance on *Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966), an out of circuit case that carries at most persuasive value, is unavailing for at least two reasons. First, *Powell* deals with delay of sixteen months between the exhaustion of administrative remedies and initiation of litigation. There was no such delay in this case—Dr. Tudor initiated suit within *ten days* of the United States filed its complaint *and* Dr. Tudor was not privileged to file suit sooner since a NORTS was never issued

Defendants' claim that they have been "deprived of the ability [to] address these concerns in a timely fashion that could have potentially averted litigation altogether" is interesting, but unsupported by facts. Doc. 30 at 10. As discussed above, application of laches requires thorough development of facts supporting application. Though a motion to dismiss is an inappropriate vehicle, Defendants are free to pursue a motion for summary judgment. If such a motion is filed, Dr. Tudor is prepared to point to evidence showing that Defendants have been actively engaged in the administrative processes preceding this litigation which gave them ample opportunity to avoid this suit.[17] Given that Defendants actively engaged in administrative proceedings that delayed filing of this suit by the Untied States, equity cannot support application of laches. *See United States v. Guitierrez*, 839 F.2d 648, 650 (10th Cir. 1988) (recognizing circumstances in which defendant's conduct "disentitle him to the relief he seeks") (quotations omitted).

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for her sex discrimination claims. Second, the *Powell* court held that for laches to apply, the defendant must do more than point to prejudice "inherent in situations like the case, at bar" and suggested that to meet this standard defendants must point to the unavailability of specific witnesses and loss of evidence. *Powell*, 366 F.2d at 638. Just as the defendant in *Powell*, Defendants have failed to point to specific witnesses or even vaguely identity what evidence might have been lost.

[17] Dr. Tudor, the EEOC, and the United States have worked closely with Defendants since the letter of determination finding fault was issued in September 2012. For example, the parties attempted to conciliate in March 2013. In January 2014 Southeastern initiated settlement talks. In April 2014 mediation was attempted. Lines of communication remained intact for several months thereafter. In February 2015 the United States informed Defendants that it intended to file suit sometime in March if a settlement could not be reached. On March 9, 2015 Defendants' counsel sent a letter to the United States indicating interest in settlement and requested further information. The United States returned a letter to Defendants on March 18. It was determined by all parties shortly thereafter that a settlement could not be reached; the United States then filed suit.

CONCLUSION

For the foregoing reasons, Plaintiff/Intervenor Dr. Rachel Tudor respectfully asks this Court to deny Defendants' Motion to Dismiss.

Dated: June 16, 2015

Respectfully Submitted,

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Admitted *Pro Hac Vice*
Law Office of Jillian T. Weiss, P.C.
P.O. Box 642
Tuxedo Park, NY 10987
949-291-3185
Fax: 917-398-1849
eyoung@jtweisslaw.com

/s/ Jillian T. Weiss
Jillian T. Weiss (NY Bar No. 2125011)
Admitted *Pro Hac Vice*
Law Office of Jillian T. Weiss, P.C.
P.O. Box 642
Tuxedo Park, NY 10987
845-709-3237
Fax: 845-915-3283
jtweiss@jtweisslaw.com

/s/ Brittany M. Novotny
Brittany M. Novotny (Okla. Bar No. 20796)
National Litigation Law Group, PLLC
42 Shepherd Center
2401 NW 23rd St.
Oklahoma City, OK 73107
405-429-7626
Fax: 405-835-6244
bnovotny@nationlit.com

ATTORNEYS FOR PLAINTIFF/INTERVENOR

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Admitted *Pro Hac Vice*
Law Office of Jillian T. Weiss, P.C.
P.O. Box 642
Tuxedo Park, NY 10987
949-291-3185
Fax: 917-398-1849
eyoung@jtweisslaw.com