

## **\$1.16 million awarded in transgender employment discrimination jury trial**

Article By:

Zuckerman Law Whistleblower Practice Group

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An Oklahoma federal jury recently returned a [verdict](#) in favor of professor Dr. Rachel Tudor in her lawsuit claiming that Southeastern Oklahoma State University discriminated against her based on her gender and gender identity. In particular, the jury found that the school denied Dr. Tudor tenure because of her gender identity and also retaliated against her.

As a result, the jury awarded Dr. Tudor \$1.16 million in damages.

Dr. Tudor is represented by Ezra Young of the Law Office of Ezra Young, Brittany Novotny of the National Litigation Law Group and Marie E. Galindo of The Galindo Law Firm.

Southeastern Oklahoma State University is represented by Dixie L. Coffey, Jeb E. Joseph, Kindanne Jones and Timothy M. Bunson of the Oklahoma Attorney General's Office.

The United States was represented by Delora Kennebrew, Meredith Burrell, Alan Townsend, Valerie Meyer, and Shayna Bloom from the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, as well as Jennifer L. Arendes from the Equal Employment Opportunity Commission in St. Louis, MO.

### **Background**

According to the complaint, Dr. Tudor is a male-to-female transgender English professor who worked as a tenure track Assistant Professor with the school from 2004 until her termination in 2011. When she was hired, Dr. Tudor presented as a man and went by a traditionally male name.

Per the complaint, during 2007 and 2008, Dr. Tudor began to present as a woman by “wearing women’s clothing, styling her hair in a feminine manner, and going by the traditionally female name Rachel.”

Dr. Tudor was the first transgender professor ever to work at Southeastern [Oklahoma State University].

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After she began presenting as a woman, the complaint asserts that Dr. Tudor was told “she should take safety precautions because some people were openly hostile towards transgender people.”

In 2009, Dr. Tudor applied for tenure and the review committee recommended that she receive tenure. In early 2010, however, a dean and Vice President of the school rejected the committee’s recommendation and denied tenure to Dr. Tudor with no explanation for the decision, per the complaint. Dr. Tudor attempted to grieve and appeal the tenure denial and the complaint states that the school failed to follow normal appeal procedures for her appeal.

Ultimately, in April 2010, the President of the school denied Dr. Tudor’s request for tenure, again with no explanation. Eventually, the school explained that Dr. Tudor did not receive tenure because she was supposedly deficient in the areas of “research/scholarship” and “university service.” As alleged in the complaint, Dr. Tudor’s qualifications were “comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure during Dr. Tudor’s time” at the school.

In late 2010, the school refused to allow Dr. Tudor to re-apply for promotion and tenure because doing so was not in the “best interests of the university.”

## **The lawsuits**

In 2015, the U.S. Department of Justice’s (DOJ) Civil Rights Division filed a [complaint](#) against Southeastern Oklahoma State University alleging that the school had denied Dr. Tudor tenure:

- “because of Dr. Tudor’s gender and gender identity, which constitutes unlawful sex discrimination in violation of Title VII”
- “because Dr. Tudor did not conform to traditional gender stereotypes, which constitutes unlawful sex discrimination in violation of Title VII” and also
- retaliated against Dr. Tudor because she opposed the discrimination and had filed a complaint with the Department of Education

Dr. Tudor move to intervene (join) the case in May 2015 and filed a separate complaint that, among other things, also claimed that the school subjected her to a [hostile work environment](#).

The DOJ’s Civil Rights division reached a settlement with the school in September 2017 and did not participate in the jury trial.

In November 2017, Dr. Tudor and Southeastern Oklahoma State University tried the case before a jury, which found in favor of Dr. Tudor on the discrimination and retaliation claims related to the tenure denial, but not the hostile work environment claim.

It is unclear what specific damages the \$1.16 million award is intended to cover, but Title VII does have statutory limits on the amount of money that can be awarded for compensatory and punitive damages.

## **What is sex stereotyping?**

Sex-stereotyping has provided an alternative vehicle for Title VII protection for those who have

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suffered gender-identity discrimination. Simply put, discriminatory conduct against LGBT individuals can constitute prohibited sex discrimination under Title VII and other federal statutes that prohibit sex discrimination where the conduct is based on those individuals' nonconformance to gender norms.

This concept developed in a 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*, where a woman was denied partnership at Price Waterhouse because she did not conform to traditional female stereotypes. 490 U.S. 228 (1989). In explaining the legal relevance of sex-stereotyping, the Court stated that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” *Id.* at 251 (alteration in original) (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

In explaining the need for legal recognition of sex-stereotyping, the Court briefly explained: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” (*Id.*)

Less than a decade later, the Supreme Court handed down *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). The unanimous Court found that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.” (*Id.* at 79.) But the Court continued,

statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

*Id.* at 79–80 (alterations in original). The Sixth Circuit later summed up the impact of *Price Waterhouse* and *Oncale*, “[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.” The court continued, “[i]t follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.” *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

More recently, the courts of appeals for the First, Sixth, Ninth, and Eleventh Circuits, district courts in the Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and D.C. Circuits, and the EEOC have recognized that transgender individuals' sex-stereotyping claims constitute claims of sex-based discrimination.

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