

### 3 Lessons From 10th Circ. College Tenure Denial Ruling

By Alan Kabat and Devin Wrigley (September 16, 2021)

The U.S. Court of Appeals for the Tenth Circuit's Sept. 13 ruling in *Tudor v. Southeastern Oklahoma State University*[1] is an important decision for university and college tenure denial cases, as it upholds several key principles that some courts and many universities are reluctant to recognize.



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Rachel Tudor is a transgender faculty member, who alleged that she was discriminated and retaliated against because of her transgender status.

The Tenth Circuit's decision is of broader significance for three reasons.

First, tenure cases are just like other failure-to-promote cases, and can be readily reviewed by the courts and juries.

Second, expert witness testimony regarding the quality of the tenure candidate's application in comparison to others who received tenure, and the university's application of its tenure criteria, can be appropriate and is admissible.



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Third, reinstatement with tenure is an important and legitimate remedy that is presumptively available.

The Tenth Circuit's decision provides a valuable road map for litigating tenure cases.

Tenure cases in academia — which involve the denial of tenure and promotion to junior faculty members, usually "up or out" decisions, wherein a professor must be granted tenure within a certain period or else lose their job — are an important but often misunderstood type of failure-to-promote claim.

Tenure cases slightly differ from other failure-to-promote cases, since tenure applications usually involve an initial review by several scholars at other universities, who provide an independent analysis of the candidate's research.

But tenure cases otherwise involve the same analytical framework that is applied to other failure-to-promote cases: (1) whether the candidate satisfies the criteria for tenure; (2) how the candidate compares with others in the past who received tenure, i.e., comparators; and (3) whether any of the decision makers were motivated by illegal biases against the candidate, or whether they breached the contractual criteria governing the tenure process.

Tenure cases also need to address appropriate remedies, including whether to order reinstatement with tenure, or whether to limit the remedies to front pay and back pay.

Colleges and universities have historically attempted to block challenges to tenure decisions, either by arguing that the courts should not be reviewing academic judgments, or by arguing that each tenure decision stands on its own, so that the tenure candidate cannot be compared with others in the past who received tenure in the same department or program.

The courts have pushed back on these defenses, and the Tenth Circuit's recent decision in Tudor makes short shrift of them.

The Tudor case attracted two amicus briefs with a total of 33 nonprofit organizations as signatories, evidencing its broad interest and impact.

### **Tudor's Employment and Her Tenure Applications**

Tudor, a dual national of the U.S. and Chickasaw Nation, completed a doctorate thesis on modern American Indian literature.

Tudor began working a tenure-track position in 2004 in the English, Humanities and Languages Department at Southeastern Oklahoma State University.

After several years, Tudor transitioned from male to female.[2]

Tudor applied for tenure three times; the second denial was litigated.

Like most colleges and universities, Southeastern evaluates tenure candidates under three criteria: scholarship (research), teaching and service.

At a top-tier research university, research, including publications and external grants, is usually the most important factor. At a primarily teaching school like Southeastern, teaching is weighted more heavily than the other two factors.

The tenure process at most universities and colleges involves multiple layers of reviews and recommendations.

At Southeastern, the process involves: (1) a committee of tenured faculty members in the same department or program that reviews the tenure application, and then votes; (2) a recommendation by the department chair; (3) a recommendation by the dean; (4) a recommendation by the provost or vice president; and (5) a decision by the university president, which may have to be approved by the board of trustees.

Each of the higher levels is supposed to review the preceding recommendations, and then reach an independent assessment.

In reality, at most universities, the president will adopt whatever recommendation the provost or vice president makes, and Southeastern was no exception.

While research universities often include external reviews of the candidate's research by faculty members at other institutions, Southeastern does not have that step.

For Tudor, the departmental tenure committee recommended her for tenure by a 4-1 vote; the one dissenting faculty member later admitted that he stood by the decision to recommend her for tenure.[3]

The department chair also recommended her for tenure.[4] However, the dean, vice president and president all recommended a denial of tenure, and the board agreed.[5]

The evidence at trial included biased and prejudiced remarks by the dean "about Dr. Tudor's appearance," by the vice president, who made "statements about Dr. Tudor's lifestyle and his recommendation that Dr. Tudor should be summarily fired when he learned that she was

transgender," and by the affirmative action officer, who made a "sarcastic reference to Dr. Tudor's new identity." [6]

Even though there was no evidence of bias by the president, other evidence confirmed that the president delegated the tenure decision to the vice president, which supported a "cat's paw" theory of recovery, where the subordinate's bias infected the decision maker's action. [7]

Tudor filed internal and external discrimination complaints alleging sex discrimination and retaliation based on her gender and her transgender status.

While those complaints were pending, she applied anew for tenure in her seventh year, citing her new publications. However, the vice president refused to consider this application, so Tudor had to leave Southeastern in 2011, as she did not receive tenure in the allotted seven-year time period. [8]

She filed another complaint with the Equal Employment Opportunity Commission, which referred the complaint to the U.S. Department of Justice, as it involved the state government.

In the 10 years following her termination, she obtained only one nontenured position at a community college, which lasted only four years.

Meanwhile, the DOJ took the rare step of filing a complaint under Title VII of the Civil Rights Act in the U.S. District Court for the Western District of Oklahoma against Southeastern, and Tudor intervened.

While the DOJ and Southeastern reached a settlement with requirements for training and better procedures, Tudor continued litigating on her own behalf. [9]

The jury trial did not start until November 2017. The jury found for Tudor on her discrimination and retaliation claims, awarding a lump sum of \$1.165 million for back pay and emotional distress, but for Southeastern on her hostile work environment claim. [10]

After trial, Senior U.S. District Judge Robin Cauthron denied Tudor's motion for reinstatement. [11]

The Tenth Circuit appeal took longer than usual, because Southeastern argued that transgender discrimination was not covered by Title VII.

However, the university conceded that argument after the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that transgender status was covered by Title VII, and the Tenth Circuit decided the rest of the appeal. [12]

The lengthy and unanimous decision was issued by U.S. Circuit Judge David Ebel, joined by U.S. Circuit Judges Harris Hartz and Carolyn McHugh.

In addition to making the key findings analyzed below, and identifying errors in the damages awarded, the Tenth Circuit also held that Tudor was entitled to attorney fees under Title VII. [13]

## **No Judicial Deference to Academic Employment Decisions**

Like numerous other courts, the Tenth Circuit readily rejected Southeastern's defense that there should be judicial deference to academic tenure decisions.

While Title VII in 1964 originally included an exemption for certain employment decisions made by educational institutions, the Tenth Circuit pointed out that Congress removed that exemption in 1972, "making them unquestionably subject to Title VII's general prohibitions." [14]

The Supreme Court recognized this amendment in 1990 in *University of Pennsylvania v. EEOC*, stating that "the effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions." [15]

Thus, the Tenth Circuit concluded that:

a tenure decision is often the most important point in a professor's career. It would not make sense for courts to subject such a significant determination to less scrutiny than other, less important education decisions. [16]

The Tudor case should put an end to arguments advanced by universities that tenure decisions are not judicially reviewable or that a plaintiff cannot get discovery on other tenure candidates.

## **Expert Witnesses in Tenure Cases**

Expert witnesses, such as labor economists who opine on economic damages or physicians who opine on emotional or physical damages, are routinely used in discrimination and retaliation cases. In tenure cases, some plaintiffs have offered experts on the tenure process itself, to opine on whether the process was conducted properly and how the plaintiff compared with other tenure candidates, or comparators, in their field.

Before the DOJ settled its complaint, it hired professor Robert Dale Parker of the University of Illinois at Urbana-Champaign as an expert witness on the tenure process at Southeastern. Tudor also used him at trial.

Parker's research includes both 20th-century American literature and Native American literature, so he was well positioned to evaluate Tudor's research. [17]

Parker's 30-page expert report compared Tudor's qualifications with those of the four other successful tenure applicants in the same department. [18]

The Tenth Circuit found that Parker satisfied the criteria under Federal Rule of Evidence 702, and the standard set forth in the Supreme Court's 1993 *Daubert v. Merrell Dow Pharmaceuticals Inc.* decision, since his "methodology was rooted in his experience as an English professor having participated in over 100 promotion deliberations." [19]

Therefore, the district court could reasonably:

conclude that Dr. Parker was qualified to explain the tenure application process and to recognize strong and weak applications in the field of English ... [and] that Dr. Parker's method of comparison was reliable. [20]

Moreover, since laypersons on the jury, and indeed, most judges, "are likely unfamiliar with the tenure process," the Tenth Circuit held that:

a comparison of Dr. Tudor's application to those of successful applicants could shed light on whether Southeastern's reasons for the tenure denial — lack of scholarship and service — were disingenuous.[21]

Parker's report concluded that, compared with the other four candidates who recently received tenure in the same department, only one comparator was clearly better than Tudor, and the others were either equivalent to or less qualified than she was, although he was careful to note that all four comparators merited tenure.[22]

While the Tenth Circuit noted that some other courts had excluded expert testimony in tenure cases "as irrelevant and unreliable on the grounds that tenure decisions are inherently subjective," that principle did not apply here, because:

Dr. Parker did not create his own, personal standards for tenure qualification but rather relied upon, for example, Southeastern's criteria for tenure and promotion, and general standards for judging scholarship in the field.[23]

### **Reinstatement with Tenure as a Remedy**

Finally, the Tenth Circuit's decision is of broader significance in recognizing that, since the jury found that Southeastern discriminated against Tudor, reinstatement with tenure was an appropriate remedy.

Title VII provides for reinstatement, and, the Tenth Circuit explains, the courts have expressed a "clear preference for reinstatement" in order to provide make-whole relief to successful plaintiffs.[24]

Thus, the burden is on the defendant, not the plaintiff, to show that reinstatement would not be practical, which requires a showing of extreme hostility.

The Tenth Circuit recognized that, while any litigation would result in "a certain amount of hostility and friction among workers," that anticipated hostility did not rise to the level of barring reinstatement.[25]

Moreover, in the university context, where faculty members are not working alongside each other all day long, but are "inherently fairly insulated from the adverse sentiments of colleagues," it is even easier to avoid potentially hostile colleagues.[26]

Southeastern's only refuting evidence was speculative testimony offered by one faculty member that some other unnamed faculty colleagues did not want Tudor to return.[27]

Another factor that weighed in favor of reinstatement is that the president, vice president, dean, general counsel, affirmative action officer and human resources director all left Southeastern in the decade since Tudor's tenure denial.[28]

Finally, "tenure was designed to promote academic freedom by insulating professors from conflicting opinions." [29]

Since the jury's verdict found that, "were it not for gender discrimination, [Tudor] would have been granted tenure," the Tenth Circuit concluded,

we do not serve as a super-tenure committee making academic decisions for Southeastern. We are instead restoring Dr. Tudor to the position she would have been in had Southeastern not engaged in prohibited discrimination against her.[30]

## **Conclusion**

The Tenth Circuit's Tudor decision provides a clear road map for litigating denial of tenure cases at universities and colleges.

First, the courts and litigants need to recognize that a denial of tenure case is like any other denial of promotion case, so that these claims can be fully litigated, both in discovery and at trial.

Second, expert witness testimony is not only admissible, but also invaluable in analyzing the tenure process and comparator evidence.

Third, reinstatement is a presumptively available remedy, and the burden is on the university to prove that reinstatement would not be feasible at all.

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[1] *Tudor v. Southeastern Oklahoma State University*, No. 18-6102, \_\_\_ F.4th \_\_\_, 2021 WL 4166701 (10th Cir. Sept. 13, 2021).

[2] *Tudor*, slip op. at 4.

[3] *Id.* at 5-6 & 31.

[4] *Id.* at 6.

[5] *Id.* at 6.

[6] *Id.* at 18.

[7] *Id.* at 19-20.

[8] *Id.* at 6-7.

[9] *Id.* at 8.

[10] *Id.* at 8-9 & 49-54.

[11] *Id.* at 9-10.

- [12] *Id.* at 10-12 (discussing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).
- [13] *Id.* at 55 (citing 42 U.S.C. § 2000e-5(k)).
- [14] *Id.* at 34.
- [15] *University of Pennsylvania v. EEOC*, 493 U.S. 182, 190 (1990).
- [16] *Tudor*, slip op. at 34.
- [17] Expert Report of Robert Dale Parker, Ph.D. (June 6, 2016), *United States et al. v. Southeastern Oklahoma State Univ. et al.*, No. 5:15-cv-00324-C (ECF No. 205-16) (W.D. Okla. Oct. 13, 2017).
- [18] *Id.* at 4-26.
- [19] *Tudor*, slip op. at 15.
- [20] *Id.*
- [21] *Id.*
- [22] See Expert Report of Robert Dale Parker, *supra*, at 4.
- [23] *Tudor*, slip op. at 16. The district court reached the same result. *United States v. Southeastern Oklahoma State Univ.*, No. 5:15-cv-00324-C, 2017 WL 3909606 (W.D. Okla. Sept. 6, 2017).
- [24] *Tudor*, slip op. at 22 (citing 42 U.S.C. § 2000e-5(g)(1), *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), and *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1173 (10th Cir. 1985)).
- [25] *Id.* at 23.
- [26] *Id.* at 23.
- [27] *Id.* at 26-29.
- [28] *Id.* at 30 & n.12.
- [29] *Id.* at 31.
- [30] *Id.* at 33.