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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DR. RACHEL TUDOR,

Plaintiff - Appellant/Cross-Appellee,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY; THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendants - Appellees/Cross-Appellants.

Nos. 18-6102 & 18-6165

NATIONAL WOMEN'S LAW CENTER; A BETTER BALANCE; ALLIANCE FOR A JUST SOCIETY; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF TEACHERS; ATLANTA WOMEN FOR EQUALITY, CALIFORNIA WOMEN LAWYERS; COLORADO WOMEN'S BAR ASSOCIATION; COLORADO ORGANIZATION FOR LATINA OPPORTUNITY AND REPRODUCTIVE RIGHTS; DC COALITION AGAINST DOMESTIC VIOLENCE, END RAPE ON CAMPUS; GENDER JUSTICE; GIRLS FOR GENDER EQUITY; IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE; IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA;

LAWYERS CLUB OF SAN DIEGO; LEGAL AID AT WORK; LEGAL VOICE; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL CRITTENTON; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL LGBTQ TASK FORCE; NATIONAL NETWORK OF ABORTION FUNDS; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S POLITICAL CAUCUS; OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE; SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW; SISTERREACH; THE WOMEN'S LAW CENTER OF MARYLAND; WOMEN'S LAW PROJECT; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.,

Amici Curiae.

Appeals from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:15-CV-00324-C)

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Zachary West, Assistant Solicitor General (Andy N. Ferguson, Staff Attorney, with him on the briefs), Office of Attorney General, Oklahoma City, Oklahoma, for Defendants-Appellees.

Erica C. Lai, Cohen & Gresser LLP, Washington, D.C. (Emily Martin and Sunu P. Chandy, National Women's Law Center, Washington, D.C.; Melissa H. Maxman and

Danielle C. Morello, Cohen & Gresser LLP, Washington, D.C.; Danielle E. Perlman, Cohen & Gresser LLP, New York, New York, with her on the brief), for Amici Curiae National Women's Law Center, et al.

Gregory R. Nevins, Lambda Legal Defense and Education Fund Inc., Atlanta, Georgia, for Amicus Curiae Lambda Legal.

Before **HARTZ**, **EBEL**, and **McHUGH** Circuit Judges.

EBEL, Circuit Judge.

Dr. Rachel Tudor sued her former employer, Southeastern Oklahoma State University, under Title VII, claiming discrimination on the basis of sex, retaliation, and a hostile work environment after Southeastern denied her tenure, denied her the opportunity to reapply for tenure, and ultimately terminated her from the university. A jury found in favor of Dr. Tudor on her discrimination and retaliation claims and awarded her damages. The district court then applied the Title VII statutory cap to reduce the jury's award, denied Dr. Tudor reinstatement, and awarded front pay.

Both parties appeal. Southeastern challenges evidentiary rulings and the jury verdict. Dr. Tudor, on the other hand, attacks several of the court's post-verdict rulings, challenging the district court's denial of reinstatement, calculation of front pay, and application of the statutory damages cap.

We reject Southeastern's challenges. But, regarding Dr. Tudor's appeal, we hold that there was error both in denying reinstatement and in calculating front pay, although there was no error in applying the Title VII damages cap. Exercising

jurisdiction under 28 U.S.C. § 1291, we AFFIRM in part and REVERSE in part and REMAND for further proceedings.

I. BACKGROUND[1]

A. General Background

Dr. Tudor is a transgender woman who is a dual citizen of the United States and Chickasaw Nation. She earned a Ph.D. in English from the University of Oklahoma in 2000. In 2004, Dr. Tudor began working at Southeastern Oklahoma State University as a tenure-track assistant professor in the English, Humanities, and Languages Department ("English Department"). Southeastern is part of the Regional University System of Oklahoma (RUSO), the other defendant in this case.

When Dr. Tudor started teaching at Southeastern, she presented as a male. Approximately three years later, in the spring of 2007, however, Dr. Tudor informed Southeastern's Human Resources Office that she planned to transition from male to female over the summer. She returned to teaching in the next semester now presenting as a woman, Rachel Tudor.

B. Tenure Applications

Southeastern's tenure application process involves review of the applicant's portfolio by a faculty committee, the department chair, the college dean, and the vice

[1] Because the jury found in favor of Dr. Tudor on her discrimination and retaliation claims and because Southeastern challenges the sufficiency of the evidence to support that verdict, we recount the facts that were presented to the jury at trial in the light most favorable to Dr. Tudor. Webco Indus., Inc. v. Thermatool Corp., 278 F.3d 1120, 1128 (10th Cir. 2002).

president of academic affairs. Each entity issues a recommendation to the university president, who then makes the final tenure determination and seeks approval from the RUSO governing board. To obtain tenure, then, Dr. Tudor needed to receive a favorable recommendation from: (1) a tenure committee comprised of five faculty members; (2) the then English Department Chair, John Mischo; (3) the then Arts and Sciences dean, Lucretia Scoufos; (4) the then vice president for academic affairs, Doug McMillan; (5) the then university president, Larry Minks; and (6) RUSO's governing board. RUSO's governing board generally approves the recommendation given by the university president. Southeastern's tenure-application process assesses applicants for excellence in three areas: scholarship, service, and teaching.

1. Application for Tenure in 2008

In fall 2008, Dr. Tudor submitted her tenure portfolio to a faculty committee, the first level of review in the application process. The committee voted against tenure, and Dr. Tudor withdrew the application.

2. Application for Tenure in 2009-10

In fall 2009, Dr. Tudor again applied for tenure, providing evidence of all three above criteria—teaching, scholarship, and service—in her portfolio. For example, her portfolio contained a regional conference presentation, two articles accepted for publication in peer-reviewed journals, a poetry book, and service on multiple committees at Southeastern.

The five-faculty-member tenure committee recommended Dr. Tudor receive tenure by a 4-to-1 vote (Dr. Randy Prus, who would only later become the

department chair, voting against). Dr. Mischo, the then department chair, also recommended tenure. Despite the faculty committee's and department chair's approval, Dean Scoufos, Vice President McMillan, and President Minks recommended denial of tenure. Dr. Tudor and one of her colleagues later testified that they had never heard of the administration denying an applicant tenure after the faculty committee recommended granting it.

Before receiving President Minks's denial, Dr. Tudor met with Dean Scoufos, who told her that if she withdrew her current application, she could reapply for tenure in the future. Ultimately, Dr. Tudor did not withdraw her application, and President Minks denied it. After Dr. Tudor filed grievances with the faculty appellate committee regarding the lack of any explanation for the denial, Vice President McMillan identified President Minks's rationale as based on deficiencies in scholarship and service.

In August 2010, Dr. Tudor filed discrimination complaints with the faculty appellate committee, Southeastern's affirmative-action officer, and the U.S. Department of Education, which referred the complaint to the Equal Employment Opportunity Commission (EEOC).

3. Application for Tenure in 2010-11

In fall 2010, believing she could reapply for tenure, Dr. Tudor again submitted her tenure application, updated to account for her recent work. In October 2010, after the new department chair, Dr. Prus, had already begun assembling Dr. Tudor's tenure review committee, Dr. Prus and Dr. Tudor received a memo from Vice

President McMillan in which he stated that Southeastern's academic policies and procedures manual did not specifically proscribe a subsequent tenure application after a denial but also that the administration would not allow Dr. Tudor's reapplication for tenure in the subsequent year following denial "in the best interests of the university." (Tudor R. vol. 5 at 229.)[2]

Being prevented from reapplying in her seventh year at Southeastern was highly problematic for Dr. Tudor because "[t]enure-track faculty are only given seven years to be granted tenure or else [they're] fired." (Tudor R. Vol. 6 at 114.) Despite the policy manual language, Dr. Tudor, who served on the faculty senate's faculty policies and procedures committee, had never heard of a rule precluding a sixth- or seventh-year faculty member from reapplying for tenure after a denial.

Dr. Tudor again appealed to the faculty appellate committee, which determined that the rules permitted Dr. Tudor to reapply. After an unprecedented impasse between the faculty appellate committee and President Minks's designee, President Minks ultimately decided that Dr. Tudor could not reapply in March 2011. The faculty senate asked him to reverse the decision, but he declined. As a result, Dr. Tudor's employment contract with Southeastern expired, and Southeastern did not renew it. Dr. Tudor left Southeastern in spring 2011.

[2] Southeastern's academic policy manual stated specifically that faculty could apply for tenure in their "fifth, sixth, or seventh year" (as opposed to saying they could apply in their fifth, sixth, and seventh years). (Tudor R. vol. 5 at 188 (emphasis added).)

Based on the reapplication denial, Dr. Tudor filed a discrimination and retaliation complaint with the EEOC, which referred it to the U.S. Department of Justice (DOJ).

C. Collin College Position

Fourteen months after leaving Southeastern, Dr. Tudor obtained an English teaching position on an untenured, one-year contract basis at Collin College, a two-year community college in Texas. After Dr. Tudor taught at Collin College for four years, that college declined to renew Dr. Tudor's contract, citing negative evaluations and poor-quality teaching. She has since looked for work but has remained unemployed.

D. DOJ Complaint

The DOJ filed a complaint against Southeastern in March 2015, alleging sex discrimination and retaliation in violation of Title VII. Dr. Tudor intervened in this action with her own complaint in May 2015, bringing claims of discrimination, retaliation, and hostile work environment. In August 2017, Southeastern and the DOJ settled, resulting in the dismissal of the DOJ complaint. As part of the Southeastern/DOJ Settlement Agreement, Southeastern agreed to certain policy changes aimed at reducing discrimination at the university.

E. Trial and Judgment

The litigation between Dr. Tudor and Southeastern proceeded. After the district court rejected Southeastern's motion for summary judgment and various other pre-trial motions, including a motion to exclude the testimony of Dr. Tudor's tenure

expert, Dr. Parker, the parties tried the case before a jury. At the close of evidence, both parties made oral motions for judgment as a matter of law, which the court denied.

The jury found in Dr. Tudor's favor on her discrimination and retaliation claims, but in Southeastern's favor on Dr. Tudor's hostile work environment claim. Using the court's general verdict form (to which neither party objected), the jury awarded Dr. Tudor a lump sum of $1.165 million in damages, encompassing both backpay and compensation for physical or mental distress.

After the verdict, the district court requested additional briefing from the parties on the equitable issues of reinstatement and front pay. Dr. Tudor filed a motion for reinstatement, but the district court denied that request. She then moved for reconsideration and, in the alternative, requested $2,032,789.51 in front pay. The district court declined reconsideration and awarded Dr. Tudor $60,040.77 in front pay. Dr. Tudor lastly moved for reconsideration of the front pay award, which the court denied.

Finally, the court requested briefing on the jury award and the Title VII damages cap. It ultimately applied that $300,000 cap to the $1.165 million jury award, resulting in an award of $360,040.77. This amount reflected $60,040.77 that the court attributed to uncapped backpay and $300,000 in capped compensatory damages.

The court entered judgment and Dr. Tudor timely appealed. Southeastern then renewed its motion for judgment as a matter of law and moved for a new trial. The

district court rejected Southeastern's motions as untimely and, alternatively, denied them on the merits. Southeastern timely appealed.

II. DISCUSSION

We consider first Southeastern's appeal challenging evidentiary rulings and the jury verdict, before turning to Dr. Tudor's more substantive appeal addressing post-verdict rulings.

A. Southeastern's Cross-Appeal

Southeastern challenges the district court's decision to deny its motion to exclude Dr. Tudor's tenure expert, Dr. Parker, its motion for summary judgment, and its motion for judgment as a matter of law. None of these challenges have merit, and we affirm in each instance. Before turning to Southeastern's claims, we first discuss the impact of the Supreme Court's recent decision in Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

1. Bostock Arguments

While these appeals were pending, the Supreme Court decided Bostock and the parties here submitted additional briefing on that case. We apply Bostock in resolving this appeal. See SEC v. Mick Stack Assocs., Inc., 675 F.2d 1148, 1149 (10th Cir. 1982).

Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). One of the issues in Bostock was whether transgender discrimination constitutes Title VII

discrimination on the basis of sex. 140 S. Ct. at 1737. The Supreme Court determined that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" because "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." Id. at 1741–42. The Court thus held that Title VII "prohibit[s employers] from firing employees on the basis of homosexuality or transgender status." Id. at 1753.

Bostock overrules this Court's previous holdings in Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007), that transgender persons "are not a protected class under Title VII," that "discrimination against a [transgender person] based on the person's status as a [transgender person] is not discrimination because of sex under Title VII," and that a defendant "may not claim protection under Title VII based upon her [transgender status] per se." Id. at 1220, 1221, 1224. As a result, Etsitty is no longer valid precedent to the extent that it conflicts with Bostock. United States v. Brooks, 751 F.3d 1204, 1209 (10th Cir. 2014).

In the wake of Bostock, it is now clear that transgender discrimination, like that complained of by Dr. Tudor, is discrimination "because of sex" prohibited under Title VII. Accordingly, Southeastern concedes that Bostock invalidates its arguments in reliance on Etsitty that transgender discrimination is not enough alone to make out

a Title VII violation. (SE Supp. Br. 2.)[3] We now turn to Southeastern's arguments that remain cognizable.[4]

2. Tenure Expert

Southeastern first challenges the district court's denial of its motion to exclude the testimony of Dr. Tudor's tenure expert, Dr. Parker, arguing that the district court abandoned its gatekeeping role and that, even if the court performed this role, it should have excluded the expert testimony as unreliable, subjective, and methodologically unsound. Dr. Tudor disputed Southeastern's argument on its merits, but also argued that Southeastern waived this challenge.

This Court reviews de novo whether the district court performed its gatekeeping role. Adamscheck v. Am. Fam. Mut. Ins. Co., 818 F.3d 576, 586 (10th Cir. 2016). If the district court performed its gatekeeping role, this Court reviews the

[3] The parties also debate whether Bostock overrules DePaula v. Easter Seals El Mirador, 859 F.3d 957 (10th Cir. 2017). This is because Bostock held that Title VII incorporates the "simple and traditional standard of but-for causation," 140 S. Ct. at 1739 (internal quotation marks omitted), whereas DePaula held that a plaintiff must prove the alleged discrimination was a "primary factor" in the defendant's adverse employment action, 859 F.3d at 970. The Bostock Court also observed, however, that Congress has allowed a Title VII claim to succeed if sex was a "motivating factor" in the decision, recognizing that the but-for standard is a "viable, if no longer exclusive, path to relief under Title VII." 140 S. Ct. at 1739–40 (citing 42 U.S.C. § 2000e-2(m)). Because the jury was instructed on the motivating factor standard, which remains intact, this aspect of the case is unaffected by Bostock, and we decline to address Bostock's impact on DePaula.

[4] Even after Bostock, Southeastern contends that Dr. Tudor impermissibly brought her case as a female instead of as a male. We do not see the relevance of the male/female distinction here. While this may have been relevant to establishing a claim of sex discrimination pre-Bostock, there is no question now that Dr. Tudor's transgender claims are cognizable. The label given to Dr. Tudor's sex does not change the character of the discrimination based on her transgender identity.

decision to admit Dr. Parker's testimony for abuse of discretion. United States v. Nacchio, 555 F.3d 1234, 1241 (10th Cir. 2009). We assume without deciding that Southeastern did not waive its challenge to Dr. Parker's expert testimony because, in any event, we affirm on the merits, concluding that the district court sufficiently performed its gatekeeping role, if minimally, and did not abuse its discretion when it permitted Dr. Parker to testify.[5]

a. Legal Background

Rule 702 requires an expert witness to be qualified by "knowledge, skill, experience, training, or education," and an expert witness's testimony must be helpful to the trier of fact, based on sufficient facts, and the result of "reliable principles and methods." Fed. R. Evid. 702; see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999). The district court, as gatekeeper, is therefore responsible for ensuring expert testimony is reliable and relevant. Dodge v. Cotter Corp., 328 F.3d 1212, 1221 (10th Cir. 2003). To perform its gatekeeping role, the district court must make specific findings on the record so that this Court can determine if it carefully reviewed the objected-to expert testimony under the correct standard. Adamscheck, 818 F.3d at 586.

[5] Dr. Tudor also argued that this challenge should not be reviewed on the merits because Southeastern's appendix was not sufficient, but Southeastern was granted permission to supplement its appendix with its reply brief (the fourth brief in this case), curing the previous omissions.

b. Gatekeeping Role

In this case, the district court rejected Southeastern's challenges to Dr. Parker's testimony—that it was unreliable, inherently subjective, lacking in expertise, irrelevant, and unhelpful to the jury—in a four-page order. Although that order includes minimal specificity and detail, we conclude that the gatekeeping role was satisfied.

In performing its gatekeeping role, the district court referenced Rule 702, reviewed the arguments on both sides, and provided some (albeit brief) explanation. Cf. Adamscheck, 818 F.3d at 587–88 (court failed gatekeeping role when it made off-the-cuff decision to exclude based on one sentence by the opposition); Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3d 1083, 1088 (10th Cir. 2000) (court failed gatekeeping role when there was no statement on the record indicating a Daubert analysis was performed). Where, as here, an expert's methodology is not complex, technical, or highly specialized, a less detailed district court ruling is sufficient. See Storagecraft Tech. Corp. v. Kirby, 744 F.3d 1183, 1190 (10th Cir. 2014). Dr. Parker's methodology involved comparing Dr. Tudor's tenure application to those of successful applicants; this method is straightforward. On these particular facts, a lengthy Daubert ruling was not required, and the district court's order was minimally sufficient to satisfy this Court that the district court performed its gatekeeping role under Rule 702.

c. Abuse of Discretion

The district court did not abuse its discretion when it denied Southeastern's motion and permitted Dr. Parker to testify. Dr. Parker's methodology was rooted in his experience as an English professor having participated in over 100 promotion deliberations. It is well established that expert testimony can be based on such experience. Fed. R. Evid. 702 (listing experience as one of the ways in which an expert can be qualified). As a result, it was reasonable for the district court to conclude that Dr. Parker was qualified to explain the tenure application process and to recognize strong and weak applications in the field of English, as well as for the court to conclude that Dr. Parker's method of comparison was reliable.[6] Southeastern's arguments that Dr. Parker was unqualified because he had no experience in the specific areas of English studied by the applicants, nor any experience working at Southeastern or in Oklahoma, are unconvincing.

It was also reasonable for the district court to conclude that Dr. Parker's testimony would be relevant and helpful to the jury. Many laypeople are likely unfamiliar with the tenure process, and 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.

[6] Although Dr. Parker had access to only a partial reconstruction of Dr. Tudor's 2009-10 tenure portfolio, it was not unreasonable for the district court to determine that the hundreds of pages of documents reviewed by Dr. Parker related to Dr. Tudor's application provided him with an adequate foundation.

Finally, we decline to follow the district court and out-of-circuit caselaw that Southeastern cites to support excluding the testimony of tenure experts as irrelevant and unreliable on the grounds that tenure decisions are inherently subjective. (SE Br. 32 (collecting cases).) These cases do not render the district court's decision here manifestly unreasonable because the court was not bound by them.[7] Further, 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.

To the extent that Southeastern had valid concerns regarding Dr. Parker's methodology, such as sample size and failure to consider denied applications, these were appropriate topics for cross-examination. See Daubert, 509 U.S. at 596. District courts are given "broad discretion" in expert witness determinations, Dodge, 328 F.3d at 1223, and we cannot say that the district court abused that discretion in this case.

3. Summary Judgment

Next, because a jury trial has already occurred, we reject Southeastern's challenge to the district court's denial of its motion for summary judgment. Ortiz v.

[7] In addition, this Court is unwilling to find that tenure experts are categorically unreliable. Title VII plaintiffs may have few or no other methods to refute defendants' proffered reasons for a tenure denial. See Carlile v. S. Routt Sch. Dist. RE-3J, 739 F.2d 1496, 1500 (10th Cir. 1984) ("Despite the fact that courts are reluctant to review the merits of tenure decisions, such decisions are not exempt under Title VII. Plaintiffs seeking to show discriminatory purposes in tenure or reappointment decisions ought to have available the means of challenging such decisions.").

Jordan, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion.").[8] Even if we did consider Southeastern's challenge, it has no merit in light of Bostock, 140 S. Ct. 1731.

4. Judgment as a Matter of Law

Southeastern lastly appeals the district court's denial of its motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) and (b). This Court reviews the district court's Rule 50(b) ruling de novo. Mountain Dudes v. Split Rock Holdings, Inc., 946 F.3d 1122, 1129 (10th Cir. 2019). The district court dismissed Southeastern's 50(b) motion as untimely and, alternatively, denied it on the merits. Dr. Tudor also argues on appeal that the 50(b) motion was not preserved. Because we reject Southeastern's challenge on the merits, concluding that the jury verdict is supported by the evidence, we can assume without deciding that its renewed motion for judgment as a matter of law was both timely and preserved.

"Judgment as a matter of law under Rule 50 'is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position.'" Mountain Dudes, 946 F.3d at 1129 (quoting In re Cox Enters., Inc., 871 F.3d 1093, 1096 (10th Cir. 2017)). This Court

[8] There might be an exception to Ortiz's rule barring an appeal of the denial of summary judgment after trial when there are no material facts in dispute and the issue is purely legal. Copar Pumice Co., Inc. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011). We decline to resolve this issue because, like in Morris, there undoubtedly exist factual disputes in this case, and the legal questions have been resolved by Bostock.

does not make credibility determinations or weigh the evidence, and the evidence must be viewed in the light most favorable to the nonmoving party. Id. at 1130.

Southeastern contends that the district court erroneously denied its Rule 50(b) motion because the jury verdict in favor of Dr. Tudor on her claims of discrimination and retaliation was not supported by sufficient evidence. After careful review of the complete evidence in the light most favorable to Dr. Tudor, we conclude that it was clearly sufficient for a jury to find by a preponderance of the evidence that Dr. Tudor was denied tenure in 2009-10, as well as denied the opportunity to reapply in 2010-11, on the basis of sex, and that Southeastern refused to allow her to reapply in 2010-11 in retaliation for her Title VII complaints.[9] In part, we rely on statements from Dean Scoufos about Dr. Tudor's appearance; Vice President McMillan's statements about Dr. Tudor's lifestyle and his recommendation that Dr. Tudor should be summarily fired when he learned she was transgender; Affirmative Action Officer Stubbefield's sarcastic reference to Dr. Tudor's new identity; Dr. Parker's expert testimony that Dr. Tudor was more qualified than other professors in Dr. Tudor's same department who were granted tenure; Dr. Cotter-Lynch's testimony about Dr. Tudor's qualifications; Dr. Mischo's and Dr. Spencer's testimony that Dr. Tudor's portfolio was "sufficient" for tenure (Tudor R. vol. 7 at 158, 210); Dr. Tudor's, Dr. Mischo's and Dr. Cotter-Lynch's testimony that they had never heard of a rule

[9] The Court has carefully reviewed all the evidence but is not repeating all of it here in detail, simply to avoid unnecessarily extending this opinion since the parties are fully aware of the evidence.

barring tenure reapplication after a denial; the close temporal relationship between Dr. Tudor's protected activity and the denial of the opportunity for her to reapply for tenure; as well as evidence mentioned earlier in this opinion.

Southeastern asserts that "President Minks was the relevant decision-maker," and Dr. Tudor failed to present any evidence that he discriminated against Dr. Tudor when he denied her tenure. (SE Br. 45–46.) Dr. Tudor does not dispute President Minks is the ultimate decisionmaker; instead, she invokes the "cat's-paw" theory of recovery. "Under a cat's-paw theory of recovery (also known as 'subordinate bias' or 'rubber stamp' theory), an employer who acts without discriminatory intent can be liable for a subordinate's discriminatory animus if the employer uncritically relies on the biased subordinate's reports and recommendations in deciding to take adverse employment action." Thomas v. Berry Plastics Corp., 803 F.3d 510, 514 (10th Cir. 2015). Here, Dr. Tudor contends she presented evidence from which a jury could conclude that President Minks rubberstamped Vice President McMillan's decisions, and the latter's decisions were based on discriminatory animus. (Tudor Reply 71–72.)

Evidence supporting this theory includes that President Minks delegated the responsibility to Vice President McMillan to provide the administration's official rationale for Dr. Tudor's tenure denial in 2009-10, and he did the same for the administration's official decision to bar her tenure reapplication in 2010-11. (Id. at 72 (citing Tudor R. vol. 6 at 31 (President Minks's letter in which he informs Dr. Tudor that he "delegated the responsibility to Dr. McMillan for providing you with

the reasons for my denial" of tenure in 2009); Tudor R. vol. 5 at 229 (Vice President McMillan's letter to Dr. Tudor in which he states that he (i.e., Vice President McMillan) made the "decision as acting chief academic officer that your application/request and portfolio will not be accepted for review for the 2010-2011 academic year")).) Moreover, Dr. Knapp, who sat on all three of the faculty appellate committees that heard Dr. Tudor's grievances, testified that "[i]t seemed that the application was stopping with Dr. McMillan." (Tudor R. vol. 8 at 29–30.) Further, evidence was presented at trial that Vice President McMillan told Dr. Tudor he would recommend that President Minks deny her tenure. (SE Br. 9 (citing Tr. vol. 1 at 64–65; SE App. vol. 3 at 806).) Vice President McMillan's negative recommendation was followed by President Minks's denial, even though the faculty committee who reviewed Dr. Tudor's portfolio had voted 4-to-1 in favor of granting her tenure.

Southeastern also contends Dr. Tudor did not raise the cat's paw theory below, and the jury was not instructed on it, so it is waived. (SE Reply 22.) But by Southeastern's own repeated and very explicit admissions, this was precisely the theory Dr. Tudor presented to the jury. Southeastern asserts: Dr. Tudor's "theory at trial was that the discrimination and retaliation originated with [Vice President] McMillan. During closing, [Dr. Tudor's] attorney claimed that '[a]ll of this, it all went back to Doug McMillan' and that '[Vice President] McMillan pulled the puppet strings to push Rachel out of that university.'" (SE Br. 20 (emphases added) (quoting Tr. vol. 5 at 837, 841); see also id. at 46 (stating Dr. Tudor's "entire theory of the

case was that the true culprit was [Vice President] McMillan").) The cases Southeastern cites are all clearly distinguishable from the facts in the case before us.

For all these reasons, we affirm the district court's denial of Southeastern's renewed motion for judgment as a matter of law.

B. Dr. Tudor's Appeal

We now turn to Dr. Tudor's appeal, which challenges several of the district court's post-verdict remedy holdings. Dr. Tudor appeals the district court's denial of her request for reinstatement, the district court's front pay award, and its application of the Title VII statutory cap on damages to the jury award. We affirm the district court's application of the Title VII damages cap, but we reverse the denial of reinstatement and its front pay rulings. We remand to the district court for a recalculation of the front pay award and for an order requiring Dr. Tudor's reinstatement with tenure.

1. Reinstatement

After prevailing at trial, Dr. Tudor requested reinstatement with tenure. The district court denied that request, finding that "reinstatement is simply not feasible in this case." (Tudor R. vol. 4 at 128.) This Court reviews the district court's decision to deny reinstatement for abuse of discretion. Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1176 (10th Cir. 2003). We reverse, concluding on this record that Dr. Tudor is entitled to reinstatement with tenure.

a. Legal Background

Under Title VII,

> [i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). "[R]einstatement is the preferred remedy and should be ordered whenever it is appropriate . . . ." Abuan, 353 F.3d at 1176 (emphasis added). This clear preference for reinstatement fulfills Title VII's purpose of providing make-whole relief to victims of employment discrimination, and the district court's discretion to fashion relief is confined by this purpose. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."); Zisumbo v. Ogden Reg'l Med. Ctr., 801 F.3d 1185, 1203 (10th Cir. 2015) (observing that the court's exercise of discretion to fashion remedies under Title VII "must be tied to Title VII's twin purposes of" preventing discrimination and making victims whole).

A court's inquiry into whether reinstatement is appropriate after a jury verdict of discrimination and retaliation in plaintiff's favor therefore does not take place on a level playing field. Instead, courts must start with the strong preference for reinstatement, and then ask if the defendant has overcome this presumption by establishing the existence of extreme hostility between the parties. See EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1173 (10th Cir. 1985) (remanding ADEA case where district court awarded front pay without explaining in the first instance why reinstatement was

inappropriate). Because some hostility will inevitably be present in every case, we emphasize that the hostility must be extreme to defeat the preference for reinstatement: "Reinstatement may not be appropriate . . . when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." Id. at 1172 (emphasis added) (ADEA); see also McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1145 (10th Cir. 2006) (Title VII).

To clarify, this test does not require complete harmony among the plaintiff, the employer, and other employees—a certain amount of hostility and friction among workers is to be tolerated and expected, especially following litigation. That there is some hostility, then, will not be enough to justify a denial of the preferred remedy of reinstatement. Put another way, the extreme hostility test is not a measure of affection between an employee, employer, and colleagues. The fondness, or lack thereof, that they feel for one another does not necessarily correlate with their ability to work together. There are plenty of workarounds and solutions making reinstatement possible in cases where some animosity exists, such as a remote office, a new supervisor, or a clear set of workplace guidelines. And, as discussed further below, some positions such as higher education teaching and scholarship are inherently fairly insulated from the adverse sentiments of colleagues. Courts must look beyond ill feeling and instead address simply whether a productive working relationship would still be possible, and they must do so through the lens of a strong preference for reinstatement. See Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991) (reinstatement should be granted in "all but special instances of unusual work place hostility").

The extreme hostility inquiry is not prone to a mechanistic approach of keywords or checklists. It instead requires the court to review the specific factual situation before it and ask if the relationship can be made productive and workable for the plaintiff-employee to return to the work environment.

In addition, the extreme hostility test is an objective one, wherein the district court assesses how the working relationship could function in practice under workable safeguards and parameters. Were it otherwise, the test would be rendered unworkable because the parties would essentially be given veto power to prevent reinstatement simply based on their own, subjective views about future hostility. In other words, if the subjective feelings of the employee or employer were controlling, the "extreme hostility" exception would swallow the rule preferencing reinstatement. See Jackson v. City of Albuquerque, 890 F.2d 225, 234 (10th Cir. 1989) (in the § 1983 context, stating, "Unless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement" (quoting Allen v. Autauga Cnty. Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982))); Fester v. Farmer Bros. Co., 49 F. App'x 785, 794 (10th Cir. 2002) (unpublished) (citing the extreme hostility test and affirming the district court's grant of reinstatement despite defendant arguing that extreme hostility existed).[10]

[10] This is not to say that subjective feelings are irrelevant. They can serve as helpful evidence in applying the objective test and should be considered alongside all other circumstances. See, e.g., Abuan, 353 F.3d at 1177–78 (in addition to objective evidence of extreme hostility between the parties, plaintiff's distrust of the employer suggested that a working relationship was impossible); Jackson, 890 F.2d at 234 (that (continued)

Because this is a civil case, we apply a preponderance of the evidence standard, asking if it is more likely than not that extreme hostility would make a productive working relationship impossible—not just difficult or imperfect. Century Sur. Co. v. Shayona Inv., LLC, 840 F.3d 1175, 1177 (10th Cir. 2016).

One other factor we consider is whether the extreme hostility argument is being asserted by the plaintiff or defendant. Often, as in this case, the defendant is a large institution that should have sufficient resources to eliminate or otherwise ameliorate any hostility on its side toward the plaintiff. And when, as here, the plaintiff affirmatively seeks reinstatement, we can typically assume that the plaintiff is not asserting she would confront extreme hostility after reinstatement.

In summary, the extreme hostility defense faces a significant presumption in favor of reinstatement. Under the facts before us, it was manifestly unreasonable for the district court to conclude that extreme hostility made a productive working relationship between Dr. Tudor and Southeastern impossible. The evidence here so clearly weighs against a finding of extreme hostility that this case is one of those rare instances where we must conclude that it was an abuse of discretion to deny Dr. Tudor's request for reinstatement with tenure.

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the plaintiff had "always sought reinstatement to his former position" was one factor in the court's decision that reinstatement was appropriate despite other evidence of hostility among the parties). Subjective evidence will be more important in some cases than in others. For example, subjective feelings should not control when the objective evidence clearly points in the opposite direction. See Bingman, 937 F.3d 553 (affirming reinstatement despite the fact that plaintiff, who had misgivings and concerns about returning to work, preferred front pay because other evidence showed that the parties were on good terms).

b. Factual Application

Although the extreme hostility test considers the perspectives of both the employer and the employee, in this case we need not spend much time examining Dr. Tudor's viewpoint because she has unequivocally stated that she "desire[s] to be reinstated as an Associate Professor with tenure" at Southeastern. (Tudor R. vol. 4 at 186.) As there is no evidence that this desire is not genuine, we take her at her word, which clearly weighs in favor of the preferred remedy of reinstatement. See Jackson, 890 F.2d at 234 (reversing denial of reinstatement in part because the plaintiff had "always sought reinstatement to his former position"). The only issue in contention, then, is whether Southeastern has established that extreme hostility would make it impossible for it to reestablish a productive working relationship with Dr. Tudor.

Southeastern fails to establish extreme hostility, for two primary reasons: 1) Southeastern's evidence in favor of finding extreme hostility is insufficient on its own; and 2) regardless, the unique circumstances presented here (discussed below) point squarely towards a low likelihood of extreme hostility, far outweighing the evidence to the contrary.

i. Evidence in favor of extreme hostility

Southeastern attempted to prove extreme hostility in this case by pointing to 1) hostility within the litigation context, and 2) a statement by Dr. Prus, the current English Department chair, that some people in the department did not want Dr. Tudor to return. Both are insufficient.

To start, Southeastern cites examples of hostility during the course of the litigation, including Dr. Tudor engaging in what Southeastern contends were unfair litigation practices, such as releasing expedited trial transcripts online and leaking settlement discussion emails. But evidence of litigation hostility falls far short of demonstrating the requisite extreme hostility.

As an initial matter, litigation-based animosity will be present in nearly every case, and thus, if it alone could establish extreme hostility, the clear preference for reinstatement would be rendered meaningless in practice. See EEOC v. Century Broad. Corp., 957 F.2d 1446, 1462 (7th Cir. 1992) ("'[H]ostility common to litigation [should] not become an excuse to avoid ordering reinstatement on a general basis.' If 'hostility common to litigation' would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff." (second alteration in original) (citation omitted) (quoting Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1331 (7th Cir. 1987), vacated on other grounds, 486 U.S. 1020 (1988))).

Further, hostility within the litigation context does little to demonstrate the likelihood of hostility in the entirely different work-environment context. In litigation, for example, much of the communication is filtered by lawyers and takes place in the courtroom, where hostility is commonplace, rather than in the classroom or office. We accordingly give the litigation-hostility evidence in this case little weight. Cf. Abuan, 353 F.3d at 1178 (affirming denial of reinstatement when, among other things, hostility occurred outside the confines of litigation, including between plaintiff's counsel and defendant executives in his neighborhood); Jackson, 890 F.2d at 231 (reversing the denial

of reinstatement despite serious litigation hostilities, including derogatory language in the courtroom, the burglary of plaintiff's files from his attorney's office, negative newspaper comments made by defendant after trial, and threatened prosecution by the defendant of parties related to the settlement negotiations).

In addition to evidence of litigation hostility, Southeastern proffers the testimony of Dr. Prus, the current English Department chair, as evidence that reinstatement is infeasible. Dr. Prus testified at trial that he did not "think it would be a good thing for [the English] department if Dr. Tudor came back to work there now," nor did he think it would be a good thing for the students or for the university. (Tudor R. vol. 8 at 6.) Dr. Prus further testified that he spoke with his colleagues and they were "split at best" about the possibility of Dr. Tudor's return, with a few "who would object to it for a variety of reasons." (Id. at 9.) In a post-trial declaration, he elaborated that "at least half of the faculty oppose Dr. Rachel Tudor's possible return to work" at Southeastern and thus reinstatement would be "detrimental to department functioning and collegiality." (SE App. vol. 2 at 479.)[11]

In substance, Dr. Prus's testimony simply says that some (unnamed) individuals do not want Dr. Tudor to return, not that she would necessarily face extreme hostility from those individuals if she were to return. This distinction matters. Co-workers who dislike one another work professionally in the same environment all the time. Without

[11] To the extent that Dr. Prus's testimony presents a hearsay problem, we do not address it because Dr. Tudor did not adequately raise the issue. (Tudor Reply 15–16 (stating that Dr. Prus's statements are hearsay without providing any explanation other than one citation).)

additional, supporting evidence that it would be impossible for those who oppose Dr. Tudor's reinstatement to work productively in the same department as her, Dr. Prus's conclusory statement that department functioning would be negatively affected falls far short of establishing extreme hostility. There is also no evidence regarding how or why students and the university would be negatively impacted by Dr. Tudor's return, despite what Dr. Prus claimed. If one person speculating in a general and conclusory manner could be enough to establish extreme hostility, defendant-employers could avoid reinstatement—and therefore prevent successful plaintiffs from obtaining make-whole relief—with ease.

As a matter of law, these facts do not constitute the extreme hostility needed to overcome the law's preference for reinstatement. And even if we did find them persuasive, they are outweighed by the contrary evidence discussed below.

ii. Evidence in favor of reinstatement

Not only do the shortcomings in the evidence above demonstrate that Southeastern has provided little proof that extreme hostility will be likely, other evidence affirmatively demonstrates why it is, in fact, not likely. This evidence includes: 1) Southeastern's Settlement Agreement with the DOJ, 2) the fact that almost all primary antagonists have left Southeastern, and 3) the insulated nature of tenured professorships. The district court's observation below that "Plaintiff's only evidence in favor of reinstatement was the testimony of Dr. Meg Cotter-Lynch" overlooks the realities present in this case. (Tudor R. vol. 4 at 129.)

First, Southeastern previously entered into a Settlement Agreement with the DOJ, resolving the Title VII Complaint filed by the United States in relation to the same facts of this case. In that settlement, Southeastern agreed to hold mandatory Title VII training and implement policy changes, among other things, in order to reduce discrimination. These procedural changes target the very discrimination faced by Dr. Tudor and make it less likely to reoccur. This is a powerful indicator that Dr. Tudor's return to work at Southeastern is feasible.

Next, almost all the primary antagonists in this case have left Southeastern. Jackson, 890 F.2d at 232 (reversing denial of reinstatement in part because "most of those making complaint against plaintiff are no longer employed by [the defendant]"). President Minks, Vice President McMillan, and Dean Scoufos—all the administrators who denied Dr. Tudor tenure and denied her the opportunity to reapply for tenure—are no longer at Southeastern. Additional administrators who handled Dr. Tudor's complaints also no longer work at Southeastern, including Charles Babb, the general counsel; Claire Stubblefield, the affirmative action officer; and Cathy Conway, the human resources director.

The only potential antagonist still remaining is Dr. Prus, the current English Department chair, who has made it clear that he opposes Dr. Tudor's reinstatement.[12]

[12] In its briefing, Southeastern additionally argues that Dr. Bryon Clark, who Dr. Tudor testified "made up new rules" against her, remained at Southeastern as the Vice President for Academic Affairs. (SE Br. 60 (quoting Tudor R. vol. 6 at 124).) This Court, however, takes judicial notice that Dr. Clark has since retired. Dr. Bryon Clark Retiring After 30 Years at Southeastern, Se. Okla. State Univ. (Apr. 23, 2020),

(continued)

But Dr. Prus never participated in any of the Title VII violations and was even called by Dr. Tudor to testify at trial. Even though he voted against tenure while serving on Dr. Tudor's faculty committee in 2009-10, he testified that he stood by the committee's decision to grant it, and that he thought Dr. Tudor's 2010-11 tenure application would have merited tenure. This behavior suggests that Dr. Prus would be able to set his personal feelings or reservations aside and work with Dr. Tudor in a productive and professional manner.

Third, the structure and nature of a tenured professorship insulates such professors from ordinary hostilities among contemporaries. In other words, a tenured university professor holds an insular position that can effectively operate without the need for extensive collaboration with colleagues or school administrators. Indeed, tenure was designed to promote academic freedom by insulating professors from conflicting opinions. In a small, team-focused, or cooperative workplace, we might worry more about hostility among coworkers. Here, however, we give less weight to hostility from Dr. Tudor's colleagues who will need to interact with her on only a minimal basis. While Southeastern counters that, even if Dr. Tudor will not need to interact frequently with coworkers, she will certainly interact with students, there is no evidence that Dr. Tudor will not be able to maintain positive relationships with her students, who were not involved in and indeed may not even know about her prior dispute with the university.

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https://www.se.edu/2020/04/dr-bryon-clark-retiring-after-30-years-at-southeastern; U.S. v. Burch, 169 F.3d 666, 671 (10th Cir. 1999) ("Judicial notice may be taken at any time, including on appeal.").

Ultimately, whether reinstatement is appropriate and feasible in this case is not a close question, but even if it were, the clear preference for reinstatement serves as an additional weight on the scale, tipping it further in favor of reinstatement. Thus, starting with this presumption and considering Southeastern's almost complete lack of evidence demonstrating extreme hostility—made even more unpersuasive by the countervailing evidence in favor of reinstatement—it was an abuse of discretion for the district court to deny Dr. Tudor reinstatement. We reverse and grant Dr. Tudor reinstatement at Southeastern with tenure.

c. Southeastern's Objections to Reinstatement with Tenure

Southeastern advances several objections to reinstatement that are worth addressing, particularly given that Dr. Tudor's reinstatement is with tenure, creating a long-term relationship between the parties. Most significantly, Southeastern raises concerns about this Court's involvement in its academic decisions and educational processes. This Court is not a school board and we agree with Southeastern that courts should not make education decisions. Villanueva v. Wellesley Coll., 930 F.2d 124, 129 (1st Cir. 1991) ("[I]t is not the function of the courts to sit as 'super-tenure' committees."). We therefore do not take lightly our decision to grant Dr. Tudor reinstatement with tenure.

This is not, however, a situation where we are giving Dr. Tudor something that she would not have earned absent Southeastern's unlawful discrimination. To the contrary, in addition to requiring that the discrimination be a motivating factor in the employment decisions, the jury instructions directed the jury that, as to Dr. Tudor's claim of

discrimination based on her tenure denial in 2009-10, "[i]n order to succeed on the discrimination claim, [Dr. Tudor] must persuade you by a preponderance of the evidence that were it not for gender discrimination, she would have been granted tenure in 2009-10." (Tudor R. vol. 2 at 49, 55–56.) And, so instructed, the jury came back with a verdict for Dr. Tudor on that claim. (Id. at 71.)[13] Thus, as to the 2009-10 academic year, we have a jury finding that Dr. Tudor would have been granted tenure had she not been discriminated against.

Given the jury verdict in favor of Dr. Tudor, it is established—and we cannot now question—that Dr. Tudor would have been granted tenure in 2009-10 absent the discrimination. Thus, in granting Dr. Tudor reinstatement with tenure, 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. Such an approach is consistent with the purposes of Title VII and the familiar functions of the judiciary. See Brousard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975–76 (8th Cir. 1991) ("While Title VII unquestionably applies to tenure decisions, judicial review of such decisions is limited to whether the tenure decision was based on a prohibited factor."); Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995) ("Our review [of tenure decisions] is

[13] As to Dr. Tudor's claim of discrimination based on the reapplication denial in 2010-11, the jury instructions stated that Dr. Tudor must persuade the jury by a preponderance of the evidence that "were it not for gender discrimination, she would have been granted . . . the opportunity to re-apply for tenure in 2010-11." (Id. at 55–56.) The jury found for Dr. Tudor on this second discrimination claim. (Id. at 72.)

narrow, being limited to determining 'whether the appointment or promotion was denied because of a discriminatory reason.'" (quoting Smith v. Univ. of N.C., 632 F.2d 316, 346 (4th Cir. 1980))).

Southeastern appears to be arguing for a special rule of deference to educators, but illegal decisions by educational institutions do not enjoy special sanctity. In fact, Congress specifically removed the previous Title VII exemption for educational institutions in 1972, making them unquestionably subject to Title VII's general prohibitions. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, codified at 42 U.S.C. § 2000e-1 (1988); Univ. of Penn. v. EEOC, 493 U.S. 182, 190 (1990) ("The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.").

The jury found discrimination in this case, and we have already determined that that verdict is clearly supported by sufficient evidence. We cannot now abandon our obligation to provide Dr. Tudor with the make-whole relief to which she is entitled under Title VII solely because Southeastern is an educational institution. See Kunda v. Muhlenberg Coll., 621 F.2d 532, 550 (3d Cir. 1980) ("The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy."). Not only that, but 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.

Finally, Southeastern argues that it would be improper for this Court to grant Dr. Tudor reinstatement with tenure because it has concerns about her scholarship and teaching and believes she is not qualified. For the reasons already discussed, this argument is foreclosed by the jury verdict. The jury found that Dr. Tudor would have received tenure in 2009-10 if not for the discrimination.

* * *

For all these reasons, we reverse the district court's denial of reinstatement, holding that Dr. Tudor is entitled to reinstatement with tenure.

2. Front Pay

Although we grant Dr. Tudor reinstatement, she is also entitled to monetary damages for the period that she would have worked at Southeastern as a tenured professor had she been granted tenure when she applied in 2009-10 until the time of her reinstatement (subject, of course, to mitigation obligations and cutoffs). Front pay and reinstatement are not mutually exclusive, as the Supreme Court made clear in Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001) (defining front pay as "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement" (emphasis added)). In other words, even when reinstatement is granted, front pay should also be awarded until that reinstatement can be accomplished.

Dr. Tudor challenges the district court's award of $60,040.77 in front pay as insufficient and erroneously calculated. Although Dr. Tudor's claim that she is entitled to front pay for her remaining work-life expectancy will now be mooted by

the grant of reinstatement, we still analyze the district court's front pay award as it relates to Dr. Tudor's entitlement to front pay from the time of judgment until she is, in fact, reinstated with tenure.

We review the district court's front pay award for an abuse of discretion. Abuan, 353 F.3d at 1177. In so doing, we agree with Dr. Tudor that the amount used by the court as the front pay annual compensation rate was verifiably incorrect and that her untenured position at Collin College was not substantially equivalent to a tenured professorship at Southeastern. We reverse the district court's $60,040.77 front pay award and remand for a recalculation consistent with this opinion.

a. Legal Background

i. Front Pay Timeline

Dr. Tudor's arguments relate only to front pay, but, in addressing the start of front pay eligibility, we must consider the time period covered by both front pay and backpay because those awards represent compensation for lost wages over a continuum of time; the only meaningful difference between the two is the time period for which they are awarded. See Pollard, 532 U.S. at 849. We endeavor to clarify the line between back and front pay because the district court's calculation, which used a period of time from the backpay period as a basis to select a reasonable length of time for the front pay award, was confusing on this point and should be clarified.[14]

[14] In its front pay order, the court initially seemed to grant front pay for the fourteen-month time frame occurring during the backpay period between when Dr. Tudor was terminated from Southeastern and when she obtained employment at (continued)

Backpay starts at the time of deprivation and ends when the evidence is submitted to the factfinder at the close of trial. Zisumbo, 801 F.3d at 1203. Front pay, on the other hand, typically begins at the time of judgment. Pollard, 532 U.S. at 846. Here, however, the case was submitted to the jury in November 2017, but the court did not enter judgment until June 2018. The law is clear that front pay begins at judgment, id., yet the Tenth Circuit has stated that courts must strive to provide make-whole relief. Zisumbo, 801 F.3d at 1203. Therefore, in a case where there is a gap between when backpay ends and front pay begins, as here, it is the district court's responsibility under its equitable power and discretion to add an additional amount to the front pay award beginning at the close of evidence when backpay ceased, to account for that gap.

In this case, where reinstatement has been granted, front pay ends at the time of reinstatement. Pollard, 532 U.S. at 846. Both awards, however, are subject to earlier termination based on, for example, failing to mitigate damages or obtaining substantially equivalent employment. Ford Motor Co. v. EEOC, 458 U.S. 219, 231–32, 236 (1982).

Collin College. The Court later clarified that it "is aware that front pay is an award for future damages, not compensation for the period between the end of employment and the trial." (Tudor R. vol. 5 at 80.) The front pay award, then, did not actually compensate for lost wages prior to trial, but instead used the fourteen-month period during which Dr. Tudor previously found work at Collin College as an objective measure of when she could reasonably be predicted to find reemployment in the future.

ii. Front Pay Calculation

The Tenth Circuit has identified several factors to be considered in determining a front pay award:

> (1) work life expectancy, (2) salary and benefits at the time of termination, (3) any potential increase in salary through regular promotions and cost of living adjustment, (4) the reasonable availability of other work opportunities, (5) the period within which the plaintiff may become re-employed with reasonable efforts, and (6) methods to discount any award to net present value.

McInnis, 458 F.3d at 1146 (numbers added) (quoting Whittington v. Nordam Grp. Inc., 429 F.3d 986, 1000–01 (10th Cir. 2005)). Although the district court has discretion to calculate front pay based on these factors, Whittington, 429 F.3d at 1000, it must do so with the aim to make plaintiffs whole without creating a windfall. Carter v. Sedgwick County, 36 F.3d 952, 957 (10th Cir. 1994). After considering these factors and calculating an appropriate amount of compensation, courts must then subtract any mitigation that reasonably could be obtained. See Davoll v. Webb, 194 F.3d 1116, 1143 (10th Cir. 1999).

In this case, the district court considered two factors to be determinative: the reasonable availability of other work opportunities, and the period within which Dr. Tudor could become re-employed with reasonable efforts. In light of these factors, the court limited Dr. Tudor's eligibility for front pay to fourteen months, because that was how long it took Dr. Tudor to obtain a teaching job at Collin College after leaving Southeastern. Based on Dr. Tudor's previous ability to find work within

fourteen months, the district court predicted that, moving forward, she could do so again.

However, for a potential reemployment opportunity to terminate Southeastern's front pay obligations entirely—as opposed merely to mitigating the amount of front pay owed—it must be "substantially equivalent" to the withheld position. Ford Motor Co., 458 U.S. at 236. We emphasize that the test is one of substantial equivalence. Some courts have morphed this test into a tougher standard, holding that two jobs are substantially equivalent if they offer "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." Sellers v. Delgado Cmty. Coll., 839 F.2d 1132, 1138 (5th Cir. 1988).[15] We, too, consider the same factors listed by those circuits, but we do not adopt the narrower "virtually identical" standard. Virtual identity is an unrealistic expectation—almost no two jobs will be virtually identical—and it is unfaithful to the original, and less exacting, "substantially equivalent" language to which we adhere.

In considering whether substantially equivalent job opportunities are reasonably available, courts should first and foremost consider compensation. See McInnis, 458 F.3d at 1146 (reversing denial of front pay where plaintiff "ha[d] absolutely no prospects of attaining a pay level equivalent to the pay she received"

[15] See also Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1203 (7th Cir. 1989). Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991), superseded by statute on other grounds, Pub. L. No. 102-166, 105 Stat. 1071.

while working for the defendant). Although economic factors will often predominate, other, noneconomic factors must also be considered and will vary in type and importance from case to case. See Davoll, 194 F.3d at 1145 ("Because the purpose of front pay is to make each plaintiff whole, the district court must look at the individualized circumstances of each plaintiff."). Here, relevant factors in addition to compensation include availability of tenure and promotion, academic opportunities, prestige, job responsibilities, subject matter taught, and so on—we do not intend to be exhaustive. Courts must consider and balance the wide variety of factors relevant to the particular job at issue, comparing the positions as a whole.

b. Analysis

The district court found Dr. Tudor's yearly compensation at Southeastern to be $51,463.52 (a figure that appears in Dr. Tudor's compensation table (Tudor Mot. for Front Pay Ex. 8 ("Ex. 8") at 6 (Tudor R. vol. 4 at 221))). Extending that compensation over a fourteen-month period (the time frame in which the court expected Dr. Tudor to find a new job), the district court arrived at its $60,040.77 front pay award. In reviewing, and ultimately reversing, the district court's front pay calculation, we consider both the $51,463.52 amount utilized as the front pay annual compensation as well as the fourteen-month period for which it provided that compensation.

i. Annual Compensation Amount

The district court's front pay award was premised upon an annual compensation of $51,463.52. This figure is clearly erroneous, and it was reversible error to rely on it.[16]

It is true that the district court's $51,463.52 figure comes from Dr. Tudor's own compensation table submitted to the district court with her motion for front pay. (Ex. 8 at 6.) But that table makes clear that this amount represents Dr. Tudor's total compensation (salary and benefits) had she been employed at Southeastern with tenure for only a roughly 8.5-month period between November 20, 2017—the close of trial—and July 31, 2018. (Id.) The $51,463.52 amount is thus a prorated compensation only over that 8.5-month period, and construing it as a yearly compensation, as the district court did, was clearly erroneous. (Id.) This is made even more obvious when comparing the first line of the table, containing the $51,463.52 figure, to the lines immediately following in the same chart, in which Dr. Tudor's annual compensation jumps sharply up to $75,164.16—undoubtedly because

[16] Dr. Tudor has adequately raised and preserved her argument that the $51,463.52 salary was erroneous. First, she brought the error to the district court's attention below in her motion for reconsideration of front pay. (Tudor R. vol. 5 at 53 ("[T]he $51,463.52 figure, which the front pay order identifies as Tudor's 'yearly compensation,' is actually the pro-rated projected 2017-18 term salary over a 253-day period . . . not annual salary.").) After this motion was denied and the district court entered judgment, Dr. Tudor again adequately raised this argument before this Court on appeal. (Tudor Br. 30–31, 58 ("It appears that the [$51,463.52] rate's genesis is a misreading of Dr. Tudor's front pay calculation table. The court mistook the . . . pro-rated figures to be full year earnings . . . .").)

on this very next line an entire year of salary and benefits had Dr. Tudor not been wrongfully denied tenure are being accounted for. (Id.)

Below, in denying Dr. Tudor's motion for reconsideration of front pay, the district court responded that "the evidence presented to the Court does not support [Dr. Tudor's] current argument" for a higher annual compensation, citing to a stipulation made by Dr. Tudor. (Tudor R. vol. 5 at 81.) That stipulation, contained in an affidavit submitted by Dr. Tudor with her motion for front pay, reads: "During the last year of my employment at Southeastern, I was paid approximately $51,279 in salary." (Tudor R. vol. 4 at 194 ¶ 6.) The district court therefore pointed to evidence that it thought supported an annual compensation of around $51,000 and stated that, given the use of the term "approximately," it "elected to use the slightly higher salary listed" in Dr. Tudor's compensation table—the $51,463.52 figure. (Tudor R. vol. 5 at 81.)

It was clear error to rely on Dr. Tudor's stipulation to justify the selection of a $51,463.52 annual compensation amount in light of this documtary evidence. As Dr. Tudor makes clear in her stipulation—and as the district court also explicitly recognizes in its denial of reconsideration—the $51,279 stipulated-to figure represented the salary Dr. Tudor earned in her last year working at Southeastern (2010-11). That salary, then, was an inappropriate comparison to the compensation in Dr. Tudor's table for three reasons: 1) the stipulation refers only to salary, whereas the compensation in Dr. Tudor's table accounts for both salary and benefits combined; 2) the stipulation refers to Dr. Tudor's untenured salary while she was last

employed at Southeastern, whereas Dr. Tudor's table accounts for the tenure promotion the jury found she should have earned, (Tudor R. vol. 4 at 171 ("Tudor's front pay base salary and benefits should be calculated as if Tudor had not been denied tenure and promotion rather than based upon what Tudor was paid at the time of her termination in May 2011.")); and 3) the stipulation refers to Dr. Tudor's salary in 2010-11, whereas the table calculates the salary Dr. Tudor would have earned in 2017-18 and beyond, including, presumably, taking into account raises in those intervening years, (id. at 217 (showing that Dr. Tudor's salary calculation added amounts for degree, rank, and experience to her but-for compensation)). Confusing the prorated $51,463.52 figure in Dr. Tudor's table (representing the tenured compensation—including benefits—she would have received at Southeastern for only 8.5 months of the 2017-18 academic year had she been granted tenure earlier in 2009-10) with the $51,279 figure in Dr. Tudor's stipulation (representing the untenured annual salary—not including benefits—that Dr. Tudor actually received in her last year working at Southeastern in 2010-11), was therefore comparing apples to oranges.

Although Dr. Tudor does not disavow her stipulation on appeal, she does not have to. The stipulation was accurate. The problem here lies not in the stipulation itself but in applying the stipulated-to salary to a very different scenario. That the two numbers are nearly the same is a mere coincidence. Dr. Tudor's table and her stipulation were clearly noncomparable.

Accordingly, it was an abuse of discretion to rely on a clearly erroneous annual compensation rate and, further, by justifying the use of that rate with a

stipulation that plainly referred to completely different circumstances. We next consider the district court's decision to terminate front pay after fourteen months. In doing so, we assume that Dr. Tudor's annual compensation at Southeastern would have been much higher than what the district court found below.[17]

ii. Front Pay Cutoff

The district court held that Dr. Tudor was entitled to front pay (at the erroneous $51,463.52 yearly rate) for a period of fourteen months given its prediction that Dr. Tudor could reasonably obtain "similar employment" within that time. (Tudor R. vol. 5 at 48.) The court based this prediction on Dr. Tudor's ability to successfully obtain a teaching position at Collin College within fourteen months after her termination from Southeastern.

In determining that the fourteen-month period should represent the time in which Dr. Tudor could reasonably be expected to find new, substantially equivalent employment—cutting off front pay entirely—the district court relied on the fact that Dr. Tudor's "pay at that college exceeded what she had made at Southeastern." (Id. at 47.) Dr. Tudor's salary at Collin College ranged between $51,184 and $58,022 (after yearly raises) during her time there. This was higher than Dr. Tudor's Southeastern salary as erroneously calculated below. Given our findings above,

[17] We leave this ultimate calculation to the district court on remand but observe for the purposes of comparing Southeastern to Collin College in the following section that Dr. Tudor's actual yearly compensation at Southeastern from November 20, 2017, to November 20, 2018, had she not been denied tenure would have been closer to $74,000.

however, the Southeastern and Collin College earnings are not comparable. The salary Dr. Tudor should have been earning at Southeastern had she not wrongfully been denied tenure at the beginning of the front pay period (around $67,000 after deducting benefits from her total compensation) was about 30 percent higher than Dr. Tudor's starting salary at Collin College and about 15 percent higher than her highest salary at Collin College—even without accounting for raises at Southeastern during that same four-year period. That is not a substantially equivalent salary.

Salary aside, the district court also did not adequately consider significant noneconomic differences between the two positions, most notably that Collin College did not offer tenure and that it was a two-year community college as compared to a four-year public university. In its front pay order, there was no acknowledgement of these differences. Rather, the order only mentioned that both positions involved teaching college-level English and (erroneously) that Dr. Tudor earned more at Collin College. It was error to fail to consider the entirety of the circumstances and omitted notable differences from its analysis. Indeed, in the academic context, we think the availability or lack of tenure is significant, as tenure is arguably the most important point in a professor's career.

Looking at the two positions as a whole, we are convinced that, as a matter of law, Dr. Tudor's positions at Southeastern and Collin College were not substantially equivalent. Collin College paid less than Southeastern, did not offer tenure, and, as a two-year community college, lacked a similar level of prestige and academic opportunities. It was thus an abuse of discretion in calculating front pay, to use the

fourteen-month period until Dr. Tudor obtained an untenured teaching position at Collin College as a benchmark for the time in which she could be expected to obtain other substantially equivalent employment in the future, because the Collin College position was not substantially equivalent to a tenured teaching position at Southeastern.

To be sure, although not substantially equivalent, the Collin College position—and any other position Dr. Tudor might reasonably obtain—remains relevant to mitigation on remand. EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980); Davoll, 194 F.3d at 1143. We leave it to the district court to calculate an appropriate length of front pay on remand aided by the guidance in this opinion.

* * *

We review the district court's front pay award "with considerable deference," Abuan, 353 F.3d at 1177, yet we are again certain that this is one of those rare instances in which we find clear error in the calculation, to Dr. Tudor's prejudice, resulting in a manifestly unreasonable front pay award. Title VII's command, as stated by this Court, is clear: make victims of discrimination whole. Carter, 36 F.3d at 957. This error resulted in a front pay award that has not made Dr. Tudor whole in this case. Accordingly, we reverse the $60,040.77 front pay award and remand for the district court to recalculate front pay consistent with this opinion including the annual compensations amount, the cutoff date and any other matters in mitigation. In recalculating front pay on remand, additional evidence may be helpful to the district

court. We leave it to the court's discretion to decide whether to reopen the record or to hold the parties to the record already created.

3. Title VII Statutory Cap

Dr. Tudor lastly challenges the district court's application of the Title VII statutory damages cap to the $1.165 million in damages awarded by the jury, which resulted in a reduced award for damages of $360,040.77 ($300,000 in capped compensatory damages and $60,040.77 in uncapped back pay). Dr. Tudor argues that Southeastern waived the cap, or else that the district court's application of the cap violated the Seventh Amendment's Reexamination Clause. We find no waiver. We review de novo whether the district court's application of the cap violated the Seventh Amendment, Patton v. TIC United Corp., 77 F.3d 1235, 1245 (10th Cir. 1996), and we find no Seventh Amendment violation. Accordingly, we affirm.

a. Legal Background

The Title VII statutory cap limits "the sum of the amount of compensatory damages awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" to $300,000 for a company the size of Southeastern. 42 U.S.C. § 1981a(a)(1), (b)(3)(D). The statute excludes from the cap "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." Id. § 1981a(b)(2). In addition to the explicit exclusion of backpay, it is well established by Supreme Court and Tenth Circuit precedent that the Title VII cap also

does not apply to front pay. Pollard, 532 U.S. at 852 ("[F]ront pay is excluded from the statutory cap."); Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 556 (10th Cir. 1999).

b. Waiver

Dr. Tudor first argues that Southeastern waived the cap because it failed to plead it in its answer. But the parties stipulated in their joint pretrial report that "[b]ased on the number of Defendants' total employees, the $300,000 damage cap at 42 U.S.C. § 1981a(b)(3)(D) applies to this case." (SE App. vol. 2 at 335.) This stipulation controls over the pleadings. Wilson v. Muckala, 303 F.3d 1207, 1215 (10th Cir. 2002). The Title VII cap was in effect.[18]

c. Reexamination Clause

Dr. Tudor next argues that the district court's application of the cap violated the Seventh Amendment's Reexamination Clause. The Reexamination Clause states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend.

[18] Dr. Tudor also argues that the cap should not apply because Southeastern did not object to the general jury verdict form, which made it impossible for the district court to know for certain how much of the jury's award was intended for the capped compensatory damages as opposed to uncapped backpay. See Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 499–501 (7th Cir. 2000) (refusing to apply Title VII's damages cap where the defendant-employer failed to object to similar jury verdict form). But Dr. Tudor also failed to raise the ambiguity of the verdict form below, and this precludes her from making this argument now. See Okland Oil Co. v. Conoco Inc., 144 F.3d 1308, 1319 (10th Cir. 1998) ("[A] party who fails to bring to the trial court's attention . . . ambiguities . . . may not seek to take advantage of such ambiguities on appeal.") We are not bound by Pals' contrary result, and regardless Pals is distinguishable, because the record shows that Dr. Tudor was aware of the cap at trial.

VII. Because the district court's application of the damages cap did not violate the Seventh Amendment, we affirm.

i. Background

The jury awarded Dr. Tudor $1.165 million in damages. This amount potentially included compensation for backpay as well as physical or mental distress, including "mental anguish, emotional pain and suffering, inconvenience, loss of enjoyment of life, damage to professional reputation, or other non-pecuniary losses." (Tudor R. vol. 2 at 61–62 (jury instructions).) Because of the way the verdict form was structured—asking only for a single number representing "the amount of damages to which Plaintiff is entitled to compensate her for her injuries"—it is impossible to know what amount should be attributed to each category of damages. (Id. at 72 (verdict form).) This created problems because the backpay award is indisputably not subject to the $300,000 cap, whereas the remainder of the damages encompassed by the jury award is.

After finding that the Title VII cap applied, the district court resolved this tension by attempting to separate the backpay award from the remainder of the total damages award. Although it had no way of knowing how much the jury attributed to backpay, the court calculated the highest amount of backpay damages that it believed the jury could have reasonably awarded, $60,040.77, observing that it was "not

persuaded" that even that amount had been given based on the evidence.[19] (Tudor R. vol. 5 at 82.) Having calculated the amount of backpay, the court set aside that uncapped amount ($60,040.77) and applied the $300,000 cap to the remaining $1,104,959.23 in capped compensatory damages, resulting in a total jury award of $360,040.77—$300,000 in capped compensatory damages and $60,040.77 in backpay.

It is clearly established that the application of a statutory damages cap to a jury award does not violate the Reexamination Clause. Est. of Sisk v. Manzanares, 270 F. Supp. 2d 1265, 1277–78 (D. Kan. 2003); Schmidt v. Ramsey, 860 F.3d 1038, 1045 (8th Cir. 2017). The Title VII cap is no exception. See, e.g., Madison v. IBP, Inc., 257 F.3d 780, 804 (8th Cir. 2001), vacated on other grounds, 536 U.S. 919 (2002); Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1201–02 (9th Cir. 2002).

Dr. Tudor's Seventh Amendment argument, however, is based not merely on the district court's decision to apply a cap to the jury award, but on that court's decision to determine what portion of the jury award could be attributed to backpay not subject to the cap. She argues that because the jury award was ambiguous as to capped versus uncapped damages, the court was not permitted to apply the cap, as the

[19] This backpay award presumably suffers from the same inaccuracies as the identical front pay award, but we do not address them here nor remand for a recalculation of backpay because regarding backpay Dr. Tudor challenges only the constitutionality of the district court's allocation between capped and uncapped damages, not the numerical calculation involved in that allocation.

entire $1.165 million could theoretically have been intended as uncapped damages. That presents a novel question under the Seventh Amendment.

ii. Analysis

We conclude that the district court constitutionally applied the Title VII cap when it allocated $60,040.77 of the jury award to backpay and capped the remainder of the award at $300,000. In attempting to prove a Seventh Amendment violation, Dr. Tudor argues that, in a mixed damages award like this one with a single, unallocated amount of damages, where it is impossible to tell what amounts are capped versus uncapped, the district court cannot constitutionally apply the cap at all since in doing so it necessarily and impermissibly reexamines uncapped damages. She cites no cases in support.

Here, the jury was not asked to allocate its damages award between uncapped and capped damages and did not make any specific finding as to backpay. As a result, there existed no decision by the jury in the first instance for the court to reexamine when it allocated the award between capped and uncapped damages. See Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899) ("[W]hen a trial by jury has been had in an action at law, . . . the facts there tried and decided cannot be re-examined in any court of the United States." (emphasis added)). The jury decided only total damages, and a portion of this figure was subject to a constitutional statutory cap. After determining the highest amount the jury could have reasonably awarded in uncapped damages—something the jury did not itself decide as part of the verdict—the court

permissibly applied the cap to the remainder. Dr. Tudor's reexamination argument therefore misses the mark.

Backpay is viewed as equitable relief in a Title VII case to be decided by the judge, Albemarle Paper Co., 422 U.S. at 416 (stating that the court's discretion to award backpay is "equitable in nature"); Whatley v. Skaggs Cos., 707 F.2d 1129, 1138 (10th Cir. 1983) ("Title 42 U.S.C. § 2000e–5(g) leaves to the discretion of the trial court the amount of back pay to be awarded a successful plaintiff in an employment discrimination action."), unless the parties have consented otherwise, Pals, 220 F.3d at 501 ("[A]n issue may be tried to the jury 'with the consent of both parties' even if the issue is 'not triable of right by a jury.'" (quoting Fed. R. Civ. P. 39(c))). Although there was no objection in this case to submitting backpay to the jury, in fact the jury did not make any specific findings of backpay, as already discussed. Instead, it issued only a general damages award. Thus, there can be no doubt about the judge's ultimate authority to allocate what portion of this damages award should be considered backpay because this determination falls within her equitable authority to decide backpay and it does not conflict with any express jury finding. See Bartee v. Michelin N. Am., Inc., 374 F.3d 906, 913 (10th Cir. 2004).

In addition, our conclusion makes sense when considering the reality that judges constitutionally adjust or even reverse jury verdicts in other contexts.

Remittitur[20] and judgment as a matter of law are two well-established examples. Prager v. Campbell Cnty. Mem'l Hosp., 731 F.3d 1046, 1061 n.8 (10th Cir. 2013) (remittiturs are constitutional); Neely v. Martin K. Eby Const. Co., 386 U.S. 317, 321 (1967) (Rule 50(b) is constitutional). In fact, Dr. Tudor's Reexamination Clause argument seems more akin to a typical remittitur challenge that the district court abused its discretion in reducing the jury award by the amount that it did (in this case, allocating $60,040.77 to backpay when it could have theoretically determined the entire award was attributable to backpay). See Prager, 731 F.3d at 1061 ("We review the trial court's decision regarding remittitur for an allegedly excessive damages award for an abuse of discretion." (quoting Palmer v. City of Monticello, 31 F.3d 1499, 1508 (10th Cir. 1994))).[21] Learning from the remittitur context, Dr. Tudor could have challenged—but didn't—the district court's calculation of backpay as an abuse of discretion, arguing for a higher amount to be allocated to uncapped

[20] Dr. Tudor refers to the district court's application of the cap as a remittitur, but she seems to do so only in the sense that the district court reduced the damages award as part of its application of the damages cap. Rather than "substitute[] its own evaluation of the evidence regarding damages for the jury's factual findings"—a remittitur—the district court simply "determine[ed] that the law does not permit the [jury] award" as per the statutory cap. Cartel Asset Mgmt. v. Ocwen Fin. Corp., 249 F. App'x 63, 80–81 (10th Cir. 2007) (unpublished) (quoting Corpus v. Bennett, 430 F.3d 912, 917 (8th Cir. 2005)).

[21] While our analogy between remittiturs and the district court's application of the cap is admittedly imperfect because, in order to be consistent with the Seventh Amendment, judges must offer plaintiffs the choice between remittitur and a new trial, Sloan v. State Farm Mut. Auto. Ins. Co., 360 F.3d 1220, 1225 (10th Cir. 2004), there is nonetheless no doubt that remittitur represents a similar instance in which a judge may permissibly examine the jury verdict. Whether the plaintiff chooses remittitur or a new trial, the original jury award will not stand.

damages, rather than challenging the constitutional application of the cap under the Seventh Amendment.[22]

It is worth emphasizing that while it is common practice to leave the backpay calculation to the jury, 2 Kent Spriggs, Representing Plaintiffs in Title VII Actions § 30.03 (2d ed. 2004), Title VII clearly identifies backpay as equitable relief. 42 U.S.C. § 2000e-5(g)(1). That backpay is a form of equitable relief, traditionally under the judge's discretion, supports our conclusion that the district court's own calculation of backpay and subsequent application of the cap under these circumstances, where the jury did not explicitly find backpay, was constitutional. See Zisumbo, 801 F.3d at 1203 (observing that "[d]istrict courts possess considerable discretion to devise appropriate remedies for Title VII violations" in the context of reviewing district court's backpay calculation); see also Galloway v. United States, 319 U.S. 372, 392 (1943) ("[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details.").

The court was careful to give the jury award its full effect by setting aside the highest amount of uncapped damages that it believed was possible for the jury to have intended prior to applying the Title VII cap. Given the constitutionality of statutory caps, that the jury made no specific determination of uncapped damages, and the wide discretion afforded courts in equitable damages decisions, we hold that

[22] The availability of such a challenge will prevent arbitrary or clearly erroneous allocations between capped and uncapped damages.

the district court's application of the cap to the jury award after setting aside backpay damages was constitutional. We reject Dr. Tudor's final challenge and affirm the jury award of $360,040.77.

C. Attorneys' Fees

Dr. Tudor requested attorneys' fees if she prevails in this appeal. Title VII allows this Court, in its discretion, to grant a prevailing party's application for reasonable attorneys' fees. 42 U.S.C. § 2000e-5(k); see also Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978). We find that Dr. Tudor is the prevailing party below and on both appeals. We therefore remand for the district court to calculate and award Dr. Tudor attorneys' fees at both the district and appellate levels.

III. CONCLUSION

For these reasons, we AFFIRM the district court's ruling on each issue in Southeastern's cross-appeal. As to Dr. Tudor's appeal, we AFFIRM the damages cap ruling but REVERSE the district court's reinstatement and front pay rulings. Finally, we REMAND to the district court for an order determining the terms and conditions of Dr. Tudor's reinstatement, a recalculation of the front pay award consistent with this opinion, and a determination of attorneys' fees to which Dr. Tudor is entitled.

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RE: 18-6102 & 18-6165, Tudor, et al v. Southeastern OK St. University, et al
Dist/Ag docket: 5:15-CV-00324-C

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in these matters. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements.

In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Jennifer Arendes
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