

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

**PETER J. HAMMER,**

Plaintiff-Appellee/Cross-Appellant

Court of Appeals No. 272801

Lower Case No. 04- 241 MK

Hon. James R. Giddings

v.

**THE BOARD OF REGENTS OF THE  
UNIVERSITY OF MICHIGAN,** a body politic,

Defendant-Appellant/Cross-Appellee

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**APPELLEE'S REPLY BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

INDEX OF AUTHORITIES .....	iv
STATEMENT OF JURISDICTION .....	vi
STANDARD OF REVIEW .....	vii
RE-STATEMENT OF QUESTIONS INVOLVED .....	viii
I. PROCEDURAL POSTURE OF THE CASE .....	1
INTRODUCTION .....	6
STATEMENT OF FACTS .....	7
ARGUMENT .....	25
I. PLAINTIFF OFFERED EVIDENCE AND DREW PERMISSIBLE INFERENCES IN THE COURT OF CLAIMS WHICH DEMONSTRATED HIS SEXUAL ORIENTATION WAS A FACTOR IN THE DENIAL OF TENURE TO HIM .....	25
a. Whether case law applicable to statutory claims is controlling should not be considered by this court for the first time on appeal where it was not raised below and where no citation to any authority is proffered for such application ..	26
b. Hammer has never sought judicial review of the merits of his tenure case nor did the trial court engage in such review, thus rendering the principle defendant asserts respecting judicial deference to university tenure decisions irrelevant ..	29
c. Hammer’s evidence in the lower court, taken together with all reasonable inferences, and free from consideration of competing evidence, tells a compelling case of deceit in the tenure process, and raises a considerable likelihood that Hammer’s sexual orientation played a deciding role in the tenure vote that ended his UM career .....	31
II. PLAINTIFF DEMONSTRATED A PRIMA FACIE CASE OF DISCRIMINATION IN BREACH OF DEFENDANT’S CONTRACTUAL OBLIGATION TO PLAINTIFF ...	32
1. Direct evidence of discriminatory animus .....	32
2. Circumstantial evidence of discrimination .....	36

3.	There was compelling evidence of faculty predisposition to discriminate . . . . .	39
4.	Defendant should not be allowed to raise the issue of pretext for the first time on appeal . . . . .	42
III.	FAILURE TO STRIKE HAMMER’S AFFIDAVIT AND MILLER’S AFFIDAVIT WAS NOT ERROR, AND EVEN IF ERROR DOES NOT REQUIRE REVERSAL IN THAT THERE IS SUFFICIENT EVIDENCE APART FROM THOSE AFFIDAVITS TO JUSTIFY THE DECISION OF THE LOWER COURT AND THE LOWER COURT ANNOUNCED IT WOULD DISREGARD INAPPROPRIATE SECTIONS OF THE SAME . . . . .	43
IV.	HAMMER’S DETRIMENTAL RELIANCE CLAIM IS MOOT . . . . .	45
	CONCLUSION AND RELIEF REQUESTED . . . . .	45

**INDEX OF AUTHORITIES**

<u>Case Law:</u>	<u>Page No.</u>
<i>Dation v Ford Motor Co.</i> , 314 Mich 152, 22 NW2d 252 (1946) .....	27
<i>Dobbs-Weinstein v Vanderbilt University</i> , 185 F3d 542, 545 (CA6, 1999) .....	30
<i>Fonesca v Michigan State University</i> , 214 Mich App 28, 542 NW2d 273 (1995) .....	36
<i>Graves v Warner Bros.</i> , 253 Mich App 480, 491; 656 NW2d 195 (2002) lv den .....	32
<i>Gutzwiller v Fenik</i> , 860 F2d 1317 (CA 6, 1988) .....	30
<i>Harrison v Olde</i> , 225 Mich App 601; 572 NW2d 697 (1997) .....	32, 33, 36, 42
<i>Heath v Alma Plastics Co.</i> , 121 Mich App 137, 142-143; 328 NW2d 598 (1982) .....	44
<i>Krohn v Sedgwick James of Michigan, Inc.</i> , 244 Mich App 289, 295; 624 NW2d 212 (2001) .....	26
<i>Lafora v Health Care &amp; Retirement Corp.</i> , 230 Mich App 801; 584 NW2d 589 (1998) .....	33
<i>Lytle v Malady</i> , 458 Mich 153, 176 (1998) .....	42, 46, 47
<i>McDonnell-Douglas Corp. v Green</i> , 411 US 792, 93 S Ct. 1817, 36 L Ed 668 (1973) .....	26, 28, 36, 37, 46
<i>Miracle Boot Pull Co. v Plastray Corp.</i> , 57 Mich App 443, 445; 225 NW2d 800 (1975) .....	42
<i>Pippin v Atallah</i> , 245 Mich App 136, 626 NW2d 911 (2001) .....	32
<i>Prudential Insurance Company of America v Cusick</i> , 369 Mich 269, 290; 120 NW2d 1 (1963) .....	27
<i>Reisman v Board of Regents of Wayne State University</i> , 188 Mich App 526, 537; 470 NW2d 678 (1991) .....	26
<i>Sherman v Sea Ray Boats, Inc.</i> , 251 Mich App 41, 57; 649 NW2d 783 (2002) .....	29
<i>Veenstra v Washtenaw Country Club</i> , 466 Mich 155, 159, 645 NW2nd 643 (2002) .....	vii

**Michigan Statutes:**

MCR 7.203(B)(1) ..... vi

MCR 7.212(C)(6) ..... 46

MCR 2.116(C)(10) ..... 46

MRE 801(C) ..... 43

MRE 801(d)(2) ..... 43

MRE 701 ..... 44

MCR 2.116(G)(6) ..... 43

MCR 2.119(B) ..... 43

Elliott Larsen Civil Rights Act ..... 28

## **STATEMENT OF JURISDICTION**

\_\_\_\_\_ On October 13, 2006 the Court of Appeals granted leave to appeal on an interlocutory basis from orders in the lower court granting and denying summary disposition and denying motions to strike affidavits. Leave was granted pursuant to MCR 7.203(B)(1). Subsequent to the appeal being granted the Defendant filed a docketing statement in which it abandoned one of the issues on appeal namely whether or not the Plaintiff, Peter Hammer, had a reasonable expectation that he would not be the victim of discrimination based upon his sexual orientation. That is no longer before the Court.

## STANDARD OF REVIEW

“The decision to grant or deny summary disposition is a question of law that is reviewed *de novo*.” *Veenstra v. Washtenaw Country Club*, 466 Mich 155, 159, 645 NW2nd 643 (2002).

**RE-STATEMENT OF QUESTIONS INVOLVED**

I. DID THE PLAINTIFF OFFER EVIDENCE AND DRAW PERMISSIBLE INFERENCES IN THE TRIAL COURT WHICH IF BELIEVED DEMONSTRATED THAT HIS SEXUAL ORIENTATION WAS A FACTOR IN THE DENIAL OF TENURE AT THE DEFENDANT LAW SCHOOL?

The Court of Claims Answered: Yes

Plaintiff Answered: Yes

Defendant Board of Regents Answered: No

II. DID PLAINTIFF DEMONSTRATE A *PRIMA FACIE* CASE THAT HIS CONTRACT WITH THE DEFENDANT THAT GUARANTEED TO HIM THAT HIS SEXUAL ORIENTATION WOULD NOT IMPEDE HIS ACQUIRING TENURE WAS BREACHED?

The Court of Claims Answered: Yes

Plaintiff Answered: Yes

Defendant Board of Regents Answered: No

III. DID THE COURT OF CLAIMS COMMIT REVERSIBLE ERROR IN CONSIDERING PORTIONS OF AFFIDAVITS FILED BY PLAINTIFF IN OPPOSITION TO SUMMARY DISPOSITION WHERE THE COURT AFFIRMATIVELY STATED ON THE RECORD IT WAS DISREGARDING MAJOR PORTIONS OF THE AFFIDAVIT?

The Court of Claims Answered: No

Plaintiff Answered: No

Defendant Board of Regents Answered: Yes

IV. HAMMER'S CLAIM OF DETRIMENTAL RELIANCE IS NOW MOOT?

The Court of Claims did not answer the question.

Plaintiff Answered: did not answer the question

Defendant Board of Regents Answered: did not answer the question.

(This issue is now moot as a result of the abandonment by Defendant of its primary issue on appeal to wit whether Plaintiff had a reasonable expectation of employment free from sexual orientation discrimination.)

## **I. PROCEDURAL POSTURE OF THE CASE**

This case arises out of the breach of a contract of employment entered into between the Plaintiff, Peter Hammer, and the Board of Regents of the University of Michigan in May 1995. Hammer was recruited by the Defendant for a faculty position at the University of Michigan Law School. At that time Hammer had a successful career in a major law firm in California, O'Melveny and Myers. Hammer also had a domestic partner and when he decided to move from private practice into academia he made an affirmative decision to conceal his sexual orientation. Plaintiff was sought after by a number of law schools, including University of Michigan, Columbia, UCLA, Georgetown and others. He ultimately accepted employment at the University of Michigan in May of 1995 after first receiving both written and oral assurances that his sexual orientation would not be a factor in his employment including the ultimate decision on whether or not to grant tenure.

In 2000 Hammer first went up for tenure and the tenured faculty voted to defer the decision for an additional two years. In 2002 the tenured faculty again met and voted 18 in favor of tenure and 12 opposed resulting in Hammer being denied tenure. Tenure could only be achieved by a favorable vote of two-thirds of those attending the tenure meeting.

Over the ensuing 15 months Hammer attempted to obtain information concerning the meeting as well as the reasons offered for the denial of tenure and was thwarted in this endeavor. He attempted to obtain complete copies of the tenure file and was thwarted in this endeavor. He attempted to file a grievance concerning not only the denial of tenure but the procedures used and the refusal to provide information and was thwarted in that endeavor. He attempted to

obtain information concerning the provost review of the tenure decision and was thwarted in that endeavor. He attempted to implement the hearing procedures under Regents By-Law 5.09 and was thwarted in that endeavor and so once he obtained employment and was safely situated at Wayne State University School of Law Plaintiff commenced the within action asserting three claims. Plaintiff's first claim consisted of a claim for violation of his reasonable expectation to be free of discrimination based on sexual orientation in the tenure process. Defendant denied that he had a reasonable expectation that was legally cognizable and further denied that his sexual orientation played any role whatsoever in denial of tenure. A second claim was that even if the facts did not support a claim based upon Hammer's reasonable expectation, they supported a claim that he detrimentally relied on the assurances given and that he should be entitled to enforce them on that theory. Given that the Defendant has now abandoned its position on Count I and acknowledges that Plaintiff had such a reasonable expectation, Count II is moot. In Count III Plaintiff asserts that he had acquired *de facto* tenure by virtue of the fact that he did not receive an appropriate notice of terminal year and acquired eight years of seniority thus entitling him to be terminated only for cause.

Once suit was commenced, Hammer sought but did not receive copies of the complete tenure file including the internal and external reviews. It was only after a conference with the Court's designated facilitator that the Defendant acceded to the request. Plaintiff sought to take the depositions of each of the individuals who had voted against tenure. Their identities took months to obtain from the Defendant and when Plaintiff then sought to depose each of those individuals Defendant provided some but not all instead again forcing Plaintiff to file a motion to compel discovery. (Docket Entry 24; 11/28/05) That motion was ultimately heard and

granted by the Court. At the completion of discovery Defendant filed a motion for summary disposition and Plaintiff filed a brief in opposition thereto together with numerous exhibits, numerous deposition transcript pages and an affidavit of Peter Hammer. On March 16, 2006, at the conclusion of extensive arguments the lower court denied summary disposition.

Two days before the hearing on the motion for summary disposition the Defendant filed a motion to strike the Plaintiff's affidavit. (Docket Entry 50; 3/14/06) The Defendant did not contact the Court to ascertain whether such late filing would be allowed. Defendant did not contact the Court to see whether the hearing could be adjourned so that such a motion could be timely filed. The Defendant did not contact the Court to see whether the Court had time on its schedule to hear such a motion as is the practice in the Court of Claims. (Transcript of 3/16/06 hearing at pp. 3-4) Defendant served the Plaintiff in such a way that Plaintiff had 24 hours notice of the motion. Plaintiff did not file a written response instead preparing to take the position in open court that the motion was not properly before the Court and unless the Court allowed such late filing or directed the Plaintiff to respond Plaintiff was going to ignore the motion. Before the motion could be argued however the lower court observed that the motion was not properly filed, was not properly before it, had not even been placed on his docket and rather the Court had found it in the file while reviewing the motion that was before it and thereupon denied the motion (Id. @ pp. 3-4). At the hearing the Defendant did not request additional time so that Plaintiff could reply nor did the Defendant seek in any way to explain the lack of process that was due to the Plaintiff (Id. @ 4). While the lower court did deny the motion the lower court at no time admonished the Defendant that it could not argue that certain of the facts were not properly opposed because the affidavit in some manner was defective. The

Court only refused to strike the affidavit. Defense counsel was free to argue the merits of the affidavit insofar as whether or not its content raised legitimate issues of fact. Defense counsel on his own chose not to do so.

After the denial of the motion for summary disposition and the motion to strike Plaintiff's affidavit the Defendant filed a motion seeking to stay proceedings so that it could appeal. (Docket Entry 73; 4/5/06) During a bench conference at the time of this motion the Court allowed during colloquy that if the Defendant sought rehearing on the motion that the Court would entertain such a motion. (Transcript of Hearing on 7/27/06 @ pp. 3-5) The Defendant determined that such proceeding was to its liking and thereafter filed a motion for reconsideration. (Docket Entry 87; 5/18/06) This motion was far more extensive than its initial motion for summary disposition being nearly twice the length of its original motion. In response, Plaintiff filed a new affidavit more extensive given the more extensive nature of the Defendant's motion and filed with it an additional affidavit of Frances Miller as well as several new exhibits. (Docket Entry 90; 6/22/06) Defendant filed a responsive brief and in addition a motion to strike or disregard Plaintiff's affidavit, the affidavit of Frances Miller and several of the exhibits. . (Docket Entry 92; 6/27/06) The motion for reconsideration resulted in the Court denying this summary disposition as to Counts I and II but granting summary disposition as to Count III. (Transcript of Hearing 7/27/06 @ pp. 55) While the Court denied the motion to strike Plaintiff's affidavit, the affidavit of Frances Miller and the exhibits in question, at least insofar as Plaintiff's affidavit was concerned the Court indicated on record that it was disregarding major portions of Plaintiff's affidavit as being inadmissible. (Transcript Hearing 7/27/06 @ pp. 6-7) Thereafter the Defendant sought leave to appeal and leave to appeal was granted limited to

the issues contained in the application. Several of the issues briefed by Defendant were never briefed for the Court of Claims. Hammer filed a claim of cross-appeal respecting the dismissal of his *de facto* tenure claim and since that issue has been separately briefed and the brief submitted, no further discussion of that issue nor of the historical facts dealing with that issue are set forth here.

## INTRODUCTION

This case concerns one of the last frontiers in civil rights – the rights of members of our society to freely enter into contracts that assure a working environment free of discrimination based upon their sexual orientation. Such protection is noticeably absent from the anti-discrimination laws. Even though this segment of our society can and does vote, can and does pay taxes, can and does hold public office, can and does contribute to the well being of society as a whole in all of the ways men and women in general contribute, society has seen fit to deny them the right to be free from discrimination in the work place, the right to marry, the right to serve in the military, the right to equal medical care, and many other rights that most of us take for granted in our daily lives.

Peter Hammer, a brilliant and talented member of our legal community, gave up a promising career in the private sector to become one of our scholars and educators. At the time he did so, he had a domestic partner with whom he lived and shared his life. In May, 1995 he made a decision that has brought him to court on his own behalf, and in many ways on behalf of all who may follow him through the halls of the UM Law School. He accepted an offer of employment as a tenure track faculty member of the law school.

## STATEMENT OF FACTS

Peter Hammer gained employment as a tenure track associate professor at the University of Michigan Law School in May of 1995. After graduating from Gonzaga University *summa cum laude*, with a Bachelor of Science in Mathematics, a Bachelor of Arts in Economics and Bachelor of Arts in Speech Communications, awarded in 1986, Hammer attended the University of Michigan Law School on a combined degree program. He received a *Juris Doctorate* degree, *magna cum laude*, in May of 1990. Following his graduation from the University of Michigan Law School Peter Hammer clerked for the Honorable Alfred T. Goodwin of the United States Court of Appeals for the Ninth Circuit and in April, 1993 completed a PhD in Economics which degree was awarded in May of 1993. His dissertation was titled Mergers, Market Power and Competition: An Economic and Legal Evaluation of Hospital Mergers. (See Hammer Curriculum Vitae)

After receiving his PhD in Economics Peter Hammer began working as a litigation associate at O'Melveny & Myers in Los Angeles, California and was employed there from April of 1993 until May of 1995 at which time he was hired by the University of Michigan Law School. Prior to accepting a position with the University of Michigan Law School Peter Hammer sought and was recruited for other positions at other prestigious schools and at the time he was seriously contemplating accepting an offer from the University of Michigan he still had viable offers from UCLA and the Georgetown Law Center. (Hammer Affidavit ¶¶ 5-9 and 15; Hammer 18-21)

Throughout his student years at the University of Michigan Peter Hammer remained

closeted with respect to his sexual orientation. Long before seeking employment at UM Peter Hammer while living in California began a serious relationship with Suny Ky. They became domestic partners in 1991. It was during the recruitment process involving various law schools that Peter Hammer took focus on the fact that not all health insurance policies provided benefits for domestic partners. Because of an illness that Peter Hammer's partner had, Hammer placed great importance on the availability of such insurance coverage in evaluating the various offers of employment that he had and that were forthcoming. It created a problem for Hammer because on the one hand Hammer was apprehensive of disclosing his sexual orientation lest he be the victim of discrimination and yet on the other hand he needed assurances that his domestic partner would be covered by health insurance in the event he accepted employment. As a result of this, Hammer was very careful not to reveal his sexual orientation until he received a firm offer of employment. Once an offer was made he disclosed his sexual orientation and the fact of his domestic partner in order to ascertain first whether the domestic partner would be covered by health insurance and as well whether this was going to create a problem for him in the employment setting. Hammer did not wish to risk accepting employment only then to experience problems such as ultimately occurred at the University of Michigan. It is for these reasons that Hammer is acutely aware of when, where and under what circumstances he revealed his sexual orientation and what assurances he required before accepting employment. (See Hammer Affidavit, ¶'s 8-13)

During the interviewing process, Hammer remained "closeted", understanding that his "status" provided him no legal protections and was hazardous to his professional health. (Hammer Affidavit ¶'s 12-13) Hammer is not flamboyant. He carries no mannerisms that are

all-too-often associated with being “gay”. Unless he told someone that he was “gay”, one would simply not have a clue.

Hammer, however, knew that before he could accept employment, he would be required to reveal his sexual orientation for reason that it was critical that his partner be insured on his medical insurance. After an employment offer was extended to him by the defendant, Hammer revealed for the first time that he was “gay”. (Hammer Affidavit ¶¶ 10-11) Among Hammer’s areas of expertise is contract law, an subject that he taught at UM and teaches at Wayne State University Law School. While he is unprotected by civil rights legislation, he knew he was free to enter into an employment contract that provided protection based upon his sexual orientation. He thereby set about to create such protection through negotiation and the creation of reasonable expectations. (Hammer Affidavit ¶¶ 12-14)

The defendant responded to his overtures with respect to guaranteeing such rights by verbally assuring him through the representations of the Chair of the Personnel Committee and the representations of the Associate Dean for Academic Affairs. (Hammer Affidavit ¶¶ 12-13) Not only were verbal assurances forthcoming, but the latter also send to Hammer the anti-discrimination ordinance of the City fo Ann Arbor (which included sexual orientation as a protected group) and the By-Laws of the University of Michigan respecting the prohibition on such discrimination (Exh. 1.) When Hammer ultimately accepted defendant’s offer of employment, he did so fully expecting defendant to live up the unequivocal commitment it had made. He had a contract.<sup>1</sup>

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<sup>1</sup>Defendant seeks to have this Court impose standards for determining Elliott Larsen Civil Rights Act claims on this breach of contract claim. There is something distasteful about imposing a standard of proof which is used to determine the initial efficacy of a discrimination

It was during this process, after the offer of employment was extended but before it was accepted, that Peter Hammer sought assurances of non-discrimination as well as domestic partner health care benefits. (Hammer Affidavit ¶'s 12-13) Kent Sevyrud, the Associate Dean for Academic Affairs at the Law School wrote to Peter Hammer on March 27, 1995 and included with his correspondence an announcement of November 4, 1994 signed by Jackie McClain, then with the Human Resource and Affirmative Action Department at the University of Michigan and a copy of the City of Ann Arbor domestic partnership registration information, giving assurances of domestic partner benefits, and assurances of non-discrimination based upon sexual orientation. (Hammer Affidavit ¶ 14) (Exh. 1) In addition, Peter Hammer sought similar assurances of non-discrimination and domestic partner health care coverages from Professor James Boyd White who was the chairperson of the Personnel Committee of the Law School that had extended the offer of employment to the Plaintiff.<sup>2</sup> In addition to being assured that his domestic partner would be covered by health insurance the Plaintiff was also assured that his sexual orientation would not be an obstacle to, among other things, his achieving tenure. (Hammer dep. ¶ 29) It was based upon these assurances that Plaintiff accepted employment at the University of Michigan as opposed to one of the other institutions that provided similar

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case on this breach of contract claim. It is as though the burdens of a statutory scheme, the privileges and rights of which have been denied to Hammer, are to be imposed on Hammer's contract rights. While Defendant asserts that Hammer's counsel has acceded to this analysis (Defendant's Brief on Appeal @ pp 14), a review of those pages of the lower court brief will dispel this notion and show that counsel has never agreed with this analysis. This case should be analyzed like any other breach of contract case.

<sup>2</sup> Notably absent from this short list are the names of those the defendant now claims knew of Hammer's sexual orientation before an offer of employment was extended.

benefits and similar protection. (See Hammer Affidavit ¶ 14)<sup>3</sup>

Hammer began his employment in May of 1995 and undertook in earnest to demonstrate the qualities that he believed would lead to tenure at the University of Michigan Law School. His teaching and his service to the University have been described as “universally regarded as terrific” and “exemplary and extraordinary,” respectively, by a person who would ultimately vote against him at tenure time. (Exh. 2) During the few years following his hire he had won two teaching awards. (Exh. 2)

In February, 2000 Hammer first went up for tenure. The tenure process at the Law School for individuals hired without tenure differs from the tenure process used to hire individuals from the outside with tenure. With respect to the latter, all faculty, tenure track and otherwise, clinical and otherwise, participate in the process and in the discussion of the candidate. The process is transparent. (Hammer Affidavit ¶ 28.) Individuals hired without tenure who thereafter seek tenure are discussed and judged only by the tenured faculty. The process begins with the appointment of a tenure committee. That committee studies the candidate’s service, teaching and writings. It solicits reviews of the candidates scholarship from faculty members as well as scholars at other universities and compiles a dossier that is distributed to the tenured faculty. (Howse 5). It then forwards a recommendation to the tenured faculty. Two secret meetings of the tenured faculty are held which culminate in a tenure vote at the close of the second meeting. In 2000 when Peter Hammer went up for tenure, the faculty voted to defer for a period of two years the decision whether or not to grant tenure and Hammer

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<sup>3</sup> The benefits that Georgetown and UCLA were going to provide for Suny Ky were through a separate offer of employment for him, as opposed to his being covered on Hammer’s policy. (Hammer Dep. 18-21)

was so notified (Exh. 3)

Plaintiff set about performing his responsibilities to the best of his ability. Plaintiff's curriculum vitae shows teaching awards and honors received; a Robert Wood Johnson Foundation Health Policy Investigation Award; 15 publications and works in progress; 3 other publications; 22 presentations at various anti-trust law sections, universities and foundations; seven other presentations at the University of Michigan, the University of Phnom Phen and six other professional and service affiliations, all of which demanded considerable time. (Hammer Curriculum Vitae)

In February of 2002 Hammer went up for tenure again. A tenure committee headed by Robert Howse collected and analyzed various internal and external reviews of the Plaintiff's writings and generated three different reports. The majority report recommended tenure for Peter Hammer and described the reasons therefor. (Exh. 5) A concurring report by Professor Malamud likewise recommended tenure. (Exh 6) A report generated by Professor J. J. White who had not reviewed all of Hammer's writings recommended against tenure. (Exh. 7, Exh. 30) At the end of the second faculty meeting a vote was taken and according to the notes taken for that meeting the final vote was 18 in favor of tenure with 12 opposed. (Exh 8) Because the law school requires a super majority vote (two-thirds of the tenured faculty attending the meeting) Plaintiff's bid failed by a narrow margin.

After Hammer was advised of the vote he attempted to ascertain the reasons for the narrow failure. Faculty that attended the meeting were all instructed by e-mail not to discuss what had transpired at the meeting with Peter Hammer but to maintain confidentiality. (Exh 9; Caminker dep at 79-80) Hammer then sought to obtain documents that related to the process

most notably the internal and external reviews but was denied access to them by the Associate Dean Evan Caminker. (Exh 10; Caminker dep at 95) Hammer was aware that the Provost's Office was to conduct a review and so Hammer wrote a lengthy letter to the Provost without the courtesy of an acknowledgment that it had been received. (Exh. 11; Courant dep at 30-31) The Provost determined not to intervene in the decision to deny tenure but never notified Hammer of the decision instead believing that the Law School would undertake that task. (Exh.12) The Law School similarly did not notify Hammer believing that the Provost would undertake that task and so Hammer was not advised until late in the Fall of 2002 that his Provost review had been unsuccessful. (Exh 13) Hammer requested documents related to the Provost review to assist him in the grievance process and was refused those documents as well. (Hammer affidavit ¶¶ 69-71)

Hammer filed a grievance in which among other things he grieved the denial of access to documents. The Law School took the position that none of the complaints Hammer had specified in his grievance were in fact grievable, citing its own internal policy which prohibited grievances dealing with the decision to grant or deny tenure a policy which was in conflict with the University policy. (Frumkin 8-11) When the grievance review board that had been appointed to hear the grievance expressed some concern about whether that policy applied to the portion of the grievance that sought relief from the denial of access to the documents Plaintiff had requested and suggested that the question be directed to the General Counsel's Office, the Law School intervened and took the position that would create a conflict of interest. (Ex. 14; Lehman 59-61) The Law School had been consulting with the General Counsel's Office all along including consulting with them on the issue of whether or not to disclose the documents that had been demanded. (Exh 15; Lehman 62)

Hammer brought this action because of an abiding belief that the unwelcoming atmosphere that he experienced was related to his sexual orientation and culminated in a minority of his former colleagues being empowered to blackball him at his tenure vote.<sup>4</sup> (Exh 29) Defendant's persistent refusal to allow Hammer access to information or a neutral review of its actions have served to strengthen that belief. The factors that led Hammer to this belief are set forth In Exhibit 31 as well as in his affidavit, attached hereto.

During his teaching years at the University he came in contact with professors with whom he had dealt previously as a law student. He was neither a stranger to the campus nor to the faculty. It was a circumstance under which one might expect a level of familiarity greater than that which occurs when a new hire is brought into the law school faculty. Despite this Hammer found himself socially ostracized. While indeed he participated in a monthly poker game with certain of his colleagues, he found that when he attended faculty functions at which families were included he was on the outside looking in so to speak (Hammer Affidavit ¶¶ 60-61). The demeanor of other faculty members with their spouses and their children was such that Hammer, his partner and the children of their extended family were not treated as welcomed guests but as bystanders. (Hammer Affidavit ¶ 60) On occasion, members of the faculty would ask Hammer how his wife was. (Hammer Affidavit ¶ 61) They had knowledge that Hammer was gay and had a same sex partner<sup>5</sup>. On other occasions another senior member of the faculty

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<sup>4</sup> While defendant seems to make light of this apprehension, Hammer's beliefs are borne out by a task force report at the University of Michigan titled "From Inclusion to Acceptance: Report of the Task Force on the Campus Climate for Transgender, Bisexual, Lesbian and Gay (TBLG) Faculty, Staff and Students" dated April 23, 2004. The report documents many instances of distrust directed at UM's commitment to diversity (**Exhibit 29**).

<sup>5</sup> Mailings from the Dean's Office would address Hammer's partner as "Ms." (Hammer Affidavit at ¶ 61)

would ask what the children referred to him as, repeatedly asking as if intoning a mantra, “what do they call you, what do they call you, what do they call you, what do they call you.” (Hammer Affidavit ¶ 61) Hammer heard remarks in the faculty lounge from a table of tenured faculty members and which included J. J. White (the dissenting tenure committee member) and others who voted against him about having to be either or homosexual or Israeli to get hired at the Law School and that there was need to for an affirmative action program for straight faculty members. No one at the table took offense or objected to the remark although Plaintiff does not know which of the individuals made the remark. (Hammer pp. 246-250)

Plaintiff also observed the mistreatment of others. He observed disparagement of James Hathaway in his professional capacity as not being a serious scholar and, when his lesbian colleagues, Brodie and Schacter, were expecting a child through artificial insemination, he heard crude jokes dealing with turkey basters and other snickering and crude remarks. (Hammer Affidavit ¶¶ 41-42; 44, 45 and ¶ 31) This was in stark contrast to the “googoo eyed welcoming that would be met when heterosexual faculty members announced their spouse’s pregnancies.” (Hammer Affidavit ¶ 31)

In addition, Plaintiff had heard stories and learned the lore of the Law School faculty as it applied to gay faculty members coming out. This history was provided to him by two of the most senior faculty members at the law school, individuals who have an extensive knowledge of the history and to some degree are directly affected by the animus Hammers complains of as well as several additional faculty members and two administrators. (Hammer Affidavit ¶ 21) James Martin had been hired and tenured during periods of time that he was believed to be heterosexual. He was married. When he came out, it was a surprise to faculty members.

Ultimately James Martin succumbed to AIDS and was the first AIDS death in Washtenaw County. J. J. White, a senior faculty member and a close associate of Marten's, wrote a memoriam for him in the Law Review. (Exh. 17) It demonstrates the cool and impersonal way that White's feelings towards Martin changed after he had come out. Similarly, there are tales of David Chambers having been groomed for the Dean's position while he was married and with children and presumed to be heterosexual only to be shunted aside after coming out. (Hammer Affidavit ¶¶ 23-24) In addition, even following the denial of tenure but during Hammer's last year in residency at the University of Michigan Law School his friend Rob Precht was asked to leave his Assistant Dean's position as a result of a study group critique of his performance, the group having been chaired by J. J. White. (Hammer Affidavit ¶¶ 53-56)

Peter Hammer had every reason to believe that the atmosphere at the Law School was one of hostility towards gay individuals. Hammer was more observable than most because he brought his Cambodian partner and the children of that extended family to University functions. Moreover, Hammer was the only man to be denied tenure over a period of decades and was the only openly gay man who had gone up for tenure during that period. (Hammer Affidavit ¶¶ 17-20)

Following the denial of tenure, at every instance where Hammer sought information and insight into the process that led to his denial he was denied access. He was denied access to his colleagues. (Exh's. 9 and 10; Hammer Affidavit @ ¶¶ 73-74) He was denied access to the internal and external reviews. (Hammer Affidavit ¶ 75) He was denied access to the grievance machinery. (Exh. 31; Hammer Affidavit ¶ 80) He was denied access to information concerning the status of the Provost review. (Hammer Affidavit ¶ 71) And so Peter Hammer ultimately

brought this action. A brief digression of Hammer's efforts and the defendant's stonewalling tactics is instructive.

Within two days following the denial of tenure, Hammer asked Lehman to soften the gag on information that had been imposed so that Hammer could better understand the reasons for the decision. (Hammer Affidavit ¶ 74; Exh. 31) On February 25, 2002 Hammer emailed Lehman requesting information about the Provost Review. On February 26, 2002 Lehman misinformed Hammer of the nature of the review indicating the Provost is provided with a statement describing the action and the candidates CV. (Exhibit 31) He did not inform Hammer that the provost will also have access to the entire tenure file – documents that Hammer has not had access to himself.

On February 27, 2002 apparently with full knowledge of this interchange, Caminker, the associate dean, then advised one of the tenure committee, Malamud, who favored a grant of tenure that no one should tell Hammer what transpired at the meeting and that he, Caminker, would "run interference" to make it easier for faculty to stick to the boundaries set for them on information. (Exh. 9) Lastly, to maintain surveillance of Hammer's efforts, he requested that she notify him before she speaks with Hammer.

On February 28, 2002 Lehman wrote to the provost providing the provost with Lehman's description of events as well as Hammer's tenure file. He labeled the letter "Confidential, Preliminary and Advisory". When questioned about why the letter bore such a caption, he testified that it was in an effort to prevent it being disclosed under the Freedom of Information Act. By so labeling it, he felt it fell within an exception to the act, acknowledging that it was not preliminary nor advisory in nature and that this legend had been used to prevent access to it.

(Lehman 97-98)

While these efforts to keep information from Hammer were ongoing, so, too was there concern about Hammer acquiring *de facto* tenure. On March 5, 2002 Caminker emailed Frumkin, an associate provost, raising concerns about whether Hammer might be eligible for *de facto* tenure. (Exh. 31) Frumkin's reply dated the same day indicated that "[t]he relevant date will be his date of hire, the wording of the two year extension, and whether he ever received notice of non-reappointment per SPG 201.88." (Exh. 31) (emphasis added)

Unlike the defendant's efforts, Hammer was always forthcoming with information. On March 19, 2002 Hammer sent Lehman, Caminker and Howse copies of a letter Hammer intended to send to the Provost to assist in his review. This letter was later sent to the Provost on April 4, 2002. (Exh. 31 @ p. 2)

The lengths to which Hammer was forced to go to obtain even the most rudimentary information, and the Defendant's efforts to thwart access to information and to prevent a neutral review of its actions are detailed in Exh. 31.<sup>6</sup>

On the 14<sup>th</sup> of August, 2002 Lehman notified Hammer that none of the issues he wishes to raise are grievable. Lehman summarily dismissed the concerns Hammer expressed about discrimination, apparently without determining the basis for Hammer's claims. (Exh. 31)

From August 20<sup>th</sup> until the spring of 2003, Hammer had more than a half dozen communications with the administration on the withholding of information to which he was entitled. He had in excess of two dozen communications with the administration on the topic of

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<sup>6</sup> Exh. 31 is a summary events respecting Hammer's quest for information, his attempts to grieve the tenure decision, his efforts vis a vis a Provost review and his seeking other employment at U of M. Attached as part of the Exhibit are the source documents.

his grievance. He had in excess of a dozen communications on the topic of provost review. He had numerous contacts with the administration on the subject of alternative employment within the University. These communications took on various forms (telephone, email, letter or conference) and were directed to or from Lehman, Caminker, the Grievance Review Board or the provost's office. In the end, all of his efforts were for naught in that the provost affirmed the decision of the dean of the law school to the effect that Hammer was not permitted to grieve any of his claims including his claim that he was being discriminated against and his claim that he was improperly being denied access to information. (Exh. 31)

All of the external reviews of his scholarship but one, which was a partial review, suggested that tenure be granted. (Exh. 18) The negative reviewer, Einer Elhauge, was an individual who had been stricken from the list of potential reviewers by Hammer in 2000 at the time of that tenure review but somehow made it back on to the list in 2002. Mark Hall, who would have been a natural person to be selected as a reviewer was stricken from this list by the committee. According to one of the individuals that voted against tenure, Hall should have been allowed to review Hammer's work. (Schneider 15-17)

One dissenting vote on the tenure committee and a vote that influenced some of the senior faculty members to vote against tenure for Peter Hammer was written by J. J. White, a tenure committee member who had not read all of Hammer's publications. (Herzog 18, e.g.; Exh 6; Exh 30) At least four of the negative votes are demonstrably tainted by individuals who condemn homosexuality as a sin or an abomination, who oppose same sex marriage or who have demonstrable homophobic traits. At least three additional individuals who voted against tenure have demonstrated serious credibility flaws with respect to their assertion that they voted against

tenure for Peter Hammer because of his scholarship such that summary disposition would be inappropriate.

In addition, there was unexplained hostility towards Hammer by one of the tenured faculty who wrote what one expert has described as an unprofessional internal review of Hammer's work. (See Affidavit of Francis Miller) Omi Ben-Shahar flew back to the United States from Israel in order to attend the tenure meeting for Hammer so that he could vote against Hammer. His review was so unprincipled that he had to apologize for its tone and yet it is one of only two reviews cited by the dissenters (those voting against tenure) as a basis for their votes. (See Affidavit of Francis Miller, e.g.; Exh 31)

Most of those who voted against tenure had great difficulty telling the truth. Several hold avowed or obvious anti-gay beliefs. Some border on homophobia.

### **William Miller**

#### Deposition testimony

- Only discussed Hammer's sexual orientation directly with Hammer at time of his job interview (Dep. 33)
- Voted to hire Hammer knowing he was gay (Dep. 33)
- Made up his mind to vote against tenure when Rich Friedman spoke at the tenure meeting (Dep. 12-13)
- Attends a conservative Shul (Dep. 16)
- The Bible, and Leviticus consider homosexuality an abomination (Dep. 16)

- The Conservative movement which he belongs to rejects that theology (Dep. 16)

#### Contrary Evidence

- The conservative movement is just now considering whether to cease its opposition to same sex marriages and admission of homosexuals to the Rabbinical (NY Times article on 3/6/06)
- Hammer did not come out until after he was offered a job (Hammer Affidavit ¶¶ 11-13)
- Admits using the example of two men kissing as something disgusting (Dep. 19-21)
- Wrote a book titled “Faking it” in which he refers to homosexuals as a pariah group and having low status (Dep. 23-35, 32)

#### **Richard Friedman**

##### Deposition testimony

- Hammer’s writings were not scholarly (Dep. 26-28)
- Hammer’s writings did not suggest the ability to become a leader in his area (Dep 27-29)
- Hammer’s teaching is not universally regarded as terrific (Dep. 43)

##### Email correspondence with colleagues 2 months following the vote to deny tenure (Exh. 19)

- Hammer is a mover and a shaker
- Hammer’s service is exemplary and extraordinary
- Hammer’s teaching is universally regarded as terrific
- Hammer is clearly a leader and a mover and shaker in health care

#### **Kyle Logue:**

##### Deposition testimony

- Unable to agree or disagree with the holding in Roe v. Wade (Dep 22-23)
- Does not know what Pro Life and Pro Choice mean in the context of abortion (Dep 21-22)
- Does not know whether the Baptist Fundamentalist Church at which he is a Sunday School teacher condemns homosexuality or if it is condemned by the Bible. (Dep 18-21)
- Voted against tenure because of scholarship

Private Investigator tapes and Huron Hills Baptist Church web site

- Strongly Pro Life and anti abortion (Private Investigator report)
- Homosexuality is a sin and an abomination (Huron Hills Baptist Church Website links)
- Homosexuals may only join the church if they agree to reform their ways (Private Investigator Report)
- Wrote email to Hammer concerning an article he reviewed for him and was very complimentary (Exh. 20)

### **Carl Schneider**

Deposition testimony

- Has not taught family law for over 10 years and is no longer an expert in the area (Dep 29)
- Has not worked through his thoughts about whether he is in favor of or against the right of gay and lesbian couples to marry (Dep 24-25)

Writings authored by or subscribed by Schneider

- Member of the Council on Family Law as recently as 2005 (Exh. 21)
- As a member is listed on a publication that recommends against legalizing same sex

marriages. (Id. At 24)

- Has written repeatedly on the subject of homosexual marriage rights (Exh 22)

### **Don Herzog**

Deposition testimony

- Voted against tenure because Hammer's scholarship was poor (Dep 8-9)
- Thomas Kauper was the senior most antitrust expert on faculty (Dep 14-15)
- Did not recall seeing any written evaluations of Hammer's work by Kauper (Dep 16)
- Felt Kauper's speech at the tenure meeting for Hammer was luke warm when it should have been forcefully positive and that reinforced his negative opinion. (Dep 15)

Contrary evidence

- Herzog has no legal training and is not a lawyer (Dep 3)
- Kauper did not attend the tenure meetings; he was at Harvard teaching at the time (Kauper at 6)
- Kauper authored 4 different reviews of Hammer's work which were all circulated to tenured faculty (Exh. 23)

### **Jeff Lehman**

Deposition testimony

- Never been publicly accused of being homophobic (Dep at 30)
- Would rather have college receive federal funds even if it meant aiding and abetting in sexual orientation discrimination contrary to college policy and city ordinance (31-33)
- Would even extend the same principles to African Americans if the legal principles that

applied were the same as those that applied to gays and lesbians

- After Hammer was denied tenure he gratuitously extended his employment for a year (Exh. 24)
- He was under no obligation to do so (Exh. 24)

Contrary evidence

- Cornell Daily Sun showed accusations of homophobia (Dep 30-31)
- Lehman acknowledged he had been publicly accused after he was reminded of the publication (Dep 30-31)
- Hammer's additional one year contract was actually awarded in July, 2000 at the request of Hammer (Dep 79; Exh. 4)
- Even aside from the extension given in July 2001, Lehman was under an obligation to provide another one year contract to Hammer under the Standard Practice Guide (Defendant's Ex. O)
- Even aside from the SPG, the tenured faculty had agreed to give Hammer another one year contract (Exh. 8)

### **Sherman Clark**

Deposition testimony

- Has argued against abortion to demonstrate technique, but has not written articles in that sense. (Dep 19)
- He holds strong Pro Choice beliefs when it comes to the abortion issue

Contrary evidence

- He wrote a law review article for Ave Maria Law School in which he expressed his strong Pro Life beliefs (Exh. 25)

### **Paul Courant (Provost)**

#### Deposition testimony

- The provost does not conduct a substantive review of tenure decisions but rather reviews to make sure the mechanisms for the tenure review are working properly.
- The input of the law school was critical in the provost's decision to affirm the denial of tenure for Hammer.

#### Contrary evidence:

- "I think [Hammer] hoped to work something out with another department at the U, but the provost told us that he would have refused to give Peter tenure even if the law school had voted affirmatively – so I doubt that will work." (Excerpt from email from Chris Brooks Whitman<sup>7</sup> to Peter K. Westin dated April 24, 2002 and attached hereto as Exh. 32)

## **ARGUMENT**

### **I. PLAINTIFF OFFERED EVIDENCE AN DREW PERMISSIBLE INFERENCES IN THE COURT OF CLAIMS WHICH DEMONSTRATED HIS SEXUAL ORIENTATION WAS A FACTOR IN THE DENIAL OF TENURE TO HIM.**

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<sup>7</sup>Professor Whitman was an associate dean at the law school immediately prior to the 2002 tenure vote in question.

**a. Whether case law applicable to statutory claims is controlling should not be considered by this court for the first time on appeal where it was not raised below and where no citation to any authority is proffered for such application.**

Defendant has embarked on new arguments for the purpose of this appeal. In the Court of Claims, Defendant's argument regarding whether he had been the victim of discrimination consumed less than 2 pages (See Defendant's Brief in Support of Motion for Summary Disposition dated February 17, 2006 at pages 12 -14) This court will find no mention of a *McDonnell-Douglas*<sup>8</sup> analysis, let alone a requirement for such analysis, nor will this court find any mention of the need to demonstrate pretext. The entire legal argument was devoted to a claim that a stray remark does not a case of discrimination make, and that generalized proof of anti-gay animosity was insufficient to prove discriminatory intent. Three cases are cited, only one of which was from Michigan<sup>9</sup>

On rehearing in the Court of Claims, defendant's arguments respecting whether or not Hammer had been the victim of discrimination expanded to approximately 3 pages. The arguments were similar to those originally posed with the added reference to a claimed lack of proof on Hammer's part that the votes cast at the tenure meeting were actually affected by any predisposition to discriminate, citing *Reisman v. Board of Regents of Wayne State University*, 188 Mich App 526, 537; 470 NW2d 678 (1991). Two other Michigan cases are cited although there is no indication in that brief why they were cited nor how they applied to the instant case. (See Defendant's Brief in Support of Motion for Reconsideration dated May 17, 2006 at pp 18 - 21) Once again, there is no discussion suggestion a *McDonnell-Douglas* analysis is required nor

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<sup>8</sup> *McDonnell-Douglas Corp. V. Green*, 411 US 792, 93 S Ct 1817, 36 L Ed 668 (1973)

<sup>9</sup> *Krohn v. Sedgwick James of Michigan, Inc.*, 244 Mich App 289, 295; 624 NW2d 212 (2001) was cited for the proposition "out with the old and in with the new" was too ambiguous to prove age discrimination. How this case applied was not discussed.

even hinting.

Defendant's argument on this issue has now swelled to 21 pages in its Brief on Appeal. Most of the arguments raised here are being briefed for the first time and were not briefed for the trial court. This court granted the extraordinary relief of an interlocutory appeal on the perception that the trial court may have erred as a matter of law in failing to grant summary disposition. To permit defendant to now raise new issues on appeal and increase the briefing of the issues at stake ten-fold is to defy the rules, not follow them. Issues raised for the first time on appeal are generally not reviewed, but there are exceptions. The modern rule is best stated as follows:

"The general rule that a question may not be raised for the first time on appeal to this Court is not inflexible." (CARR, J., writing for the unanimous Court in *Dation v. Ford Motor Co.*, 314 Mich 152, 160 Justice CARR proceeded (pp 160, 161):

"When consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied."

*Prudential Insurance Company of America v. Cusick*, 369 Mich 269,290; 120 NW2d 1 (1963)

The reason that this court should not here entertain these new arguments is that Hammer's arguments and transcript references in the lower court were in response to the issues raised by the defendant. To permit a new and different analysis may well require references to deposition pages and exhibits that were not cited to the lower court for the reason that there was no need to do so. At best, this court should consider remand to the trial court to permit the defendant to raise these new issues there. They were certainly never prohibited from doing so before and if this court is to review the decision of the lower court, it should either restrict it to those issues actually raised, or permit the new issues only upon allowance of new evidence. Hammer's

affidavit was tailored to the issues actually raised below. The deposition references were not tailored to a *McDonnell-Douglas* analysis because it was not raised.

Hammer's claims in this case are not as the defendant describes them. Similarly, defendant's assertions about what issues have been abandoned are infirm. On Page 14 of defendant's brief, in a footnote, defendant states that it does not at this juncture contest that assurances of nondiscrimination were made. In point of fact, the legal issue abandoned by the defendant was whether or not Hammer could assert a contract claim based upon reasonable expectations arising from verbal pre-hire promises of nondiscrimination, written policies of nondiscrimination and university by-laws guaranteeing nondiscrimination. At no time has defendant taken the position that these assurances were never given. To the contrary, defendant has maintained that Plaintiff had no enforceable contract right arising from these uncontested assurances. The distortions do not end here.

In Defendant's brief (at page 14) as a justification for now arguing for the first time that this case should be analyzed by using authority developed under the Elliott Larsen Civil Rights Act or Title VII, it claims that ". . . Plaintiff does not dispute that the case law developed under ELCRA provides appropriate analysis his claim." It then refers the court to Hammer's rehearing brief, but nowhere in that brief is there support for the assertion.

Hammer's claim is not a quasi-contract claim. There is something inherently offensive about applying statutory limitations to this form of discrimination when Hammer is excluded from the statutory protection of ELCRA. His claim is in contract and either rises or falls on that form of analysis. Not only was this issue not briefed in the lower court, but even here, Defendant does not cite a single authority to the court to support its claim that such analysis is

appropriate in contract cases. As such, this court should not review this new-found issue.

*Sherman v. Sea Ray Boats, Inc.*, 251 Mich App 41, 57; 649 NW2d 783 (2002)

**b. Hammer has never sought judicial review of the merits of his tenure case nor did the trial court engage in such review, thus rendering the principle defendant asserts respecting judicial deference to university tenure decisions irrelevant.**

Defendant asserts that the trial court erred in not deferring to the defendant respecting the merits of Hammer's tenure case. Such is not the case and is not borne out by the record below. Hammer has at all times been careful to focus on the motivation of the secret tenure voters insofar as that motivation may have been tainted by anti-gay animus. The sole exceptions to this endeavor involve issues of credibility for individuals such as Kyle Logue, who in writing indicated favor when it came to Hammer's scholarship (Exhibit 20), but then justified his negative vote on Hammer's scholarship. Logue was the individual who concealed his fundamentalist religious beliefs and his participation in Sunday school teaching at an institution that openly condemns homosexuality as a sin against God and an abomination. Richard Friedman was another exception. Friedman spoke out against Hammer at the secret tenure meeting based on the fact that he would not become a leader in his area (Friedman 27) – he was not a mover and a shaker-- and yet shortly after the tenure vote he wrote to colleagues at Ohio State telling them that Hammer was a leader in his area and that Hammer was a mover and a shaker. (Exh. 2)

There were others such as Don Herzog who testified he voted against Hammer in part because of Tom Kauper's words spoken at the tenure meeting that indicated he was less than

enthusiastic about Hammer's scholarship. Kauper testified that did not attend the meeting and was out of state at the time. (Kauper 6) The evidence also showed Kauper had written 4 separate evaluations of Hammer's work, all positive, and that he was surprised by the result of the vote. (Exh. 23) Kauper was the resident expert in Hammer's field. (Herzog 14-15)

While there are other examples, those above are typical of the kinds of problems the evidence presented and demonstrate that to the extent the evidence touched upon scholarship, it was to show that the articulated justifications by several of Hammer's opponents were simply not worthy of belief.

The cases cited by defendant in support of its arguments are inapposite. Defendant cites *Dobbs-Weinstein v. Vanderbilt University*, 185 F3d 542,545 (CA6, 1999) in support of its *laissez faire* position respecting tenure decisions. Plaintiff there had already achieve tenure through the grievance process and the court was not called upon to make any decision respecting an award of tenure. Further, while intoning the admonition concerning academia, the court pointed out that “. . . universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process.” (Id. @ 545) No grievance review was available to Hammer, a limitation only the law school imposed and one inconsistent with the University as a whole.

That Defendant cites *Gutzwiller v. Fenik*, 860 F2d 1317 (CA 6, 1988) as supportive of its position will likely remain one of the great mysteries of the world. There, the defendant appealed after a verdict in favor of the plaintiff on her claim that she was denied tenure based upon unlawful considerations of her gender and that she was denied her due process rights in the review of that decision. The Sixth Circuit upheld both findings. While defendant correctly

quoted from the holding, it omits the most critical part of the quote, namely, the sentence leading to the quoted language: “As noted earlier, the Supreme Court consistently has assumed that federal courts may review academic decisions of public educational institutions under a substantive due process standard.” (Id. @ 1331).

Not a single case cited by the defendant holds that the court may not, or for that matter should not, review claims of discrimination (or presumably breach of contract) arising out of tenure decisions. The lower court showed deference to the faculty view of Hammer’s ability, but did not turn a blind eye to the perjurious nature the articulated reasons given by several of the negative voters nor to their efforts to conceal their anti-gay animosity.

**c. Hammer’s evidence in the lower court, taken together with all reasonable inferences, and free from consideration of competing evidence, tells a compelling case of deceit in the tenure process, and raises a considerable likelihood that Hammer’s sexual orientation played a deciding role in the tenure vote that ended his UM career.**

In reviewing this matter, this court should bear the following in mind: 18 of 30 individual faculty members who voted avored tenure for Hammer. 4 of 5 tenure committee members who reported to the faculty on Hammer’s qualifications avored tenure. \* out of 9 external experts called upon to review Hammer’s work avored tenure. (Exh 9) The sole external expert that did not favor tenure was someone Hammer had stricken from the list 2 years earlier, but had somehow been reinserted into the process. Based upon this evidence alone, there is amply proof that Hammer was qualified for the position. Further, Hammer twice won the Teacher of the Year award. No issue is taken that Hammer applied for the position and was rejected. The sole issue before the lower court and now this court is whether, in viewing the evidence in a light

most favorable to Hammer, there is evidence which, together with any reasonable inference to be drawn from the same in Hammer's favor, raise a triable issue of fact. *Graves v. Warner Bros.*, 253 Mich App. 480, 491; 656 NW2d 195 (2002) lv den; *Pippin v. Atallah*, 245 Mich App 136, 626 NW2d 911 (2001).

## **II. PLAINTIFF DEMONSTRATED A PRIMA FACIE CASE OF DISCRIMINATION IN BREACH OF DEFENDANT'S CONTRACTUAL OBLIGATION TO PLAINTIFF.**

### **1. Direct evidence of discriminatory animus**

Defendant argues for an unacceptably narrow interpretation of what constitutes "direct evidence" of discriminatory animus. It infers that case law requires that a plaintiff demonstrate that evidence of overt discriminatory animus be linked by overt admission that the tainted decision and the discriminatory animus are causally related. A fair reading of the cases does not lead to such conclusion. Defendant further misleads the court by indicating that the only direct evidence of discriminatory animus is a single stray remark made by an unidentified faculty member. (Defendant's Brief on Appeal at page 20)

The case of *Harrison v. Olde*, 225 Mich App 601; 572 NW2d 697 (1997) is a good template for three principles applicable to the appropriate analysis of the case at bar. There, as here, the court discussed the breadth of the decision-maker is analysis finding that where one who was not the direct decision-maker nonetheless had influence on the decision, that person's discriminatory animus must also be considered in determining whether the decision (a failure to hire based on a claim of race discrimination) was motivated in part by discriminatory animus.

(Id. at 609) There, as here, the court swept away claims that remarks which clearly demonstrated discriminatory animus were mere stray remarks. (Id. at 609) There, as here, the court found that “. . . racial slurs by a decision maker constitute direct evidence of racial discrimination that is ‘sufficient to get the plaintiff’s case to the jury.’” (Id. at 610) The decision in *Harrison* was authored by now Justice Young while sitting on the Court of Appeals and was joined in by now Chief Justice Taylor. See *Lafora v. Health Care & Retirement Corp.*, 230 Mich App 801; 584 NW2d 589 (1998) holding similar remarks about an employees weight constituted direct evidence.

Applying the principles of *Harrison* to the instant case leads one to conclude that the Court of Claims’ denial of summary disposition was correct. Its impact is readily apparent when one substitutes race for sexual orientation in the remarks and avowed beliefs of the decision makers in the instant case. For example, had Miller opined to his students that the visage of two African Americans kissing was disgusting, the implication would be unquestionable. Had Loge’s beliefs and Sunday school teachings been that being an African American was a sin against God and an abomination, could anyone fairly argue that he was not a bigot? Had the remark concerning turkey basters and affirmative action for whites been tailored to racist views instead of anti-gay and anti-lesbian views, unprocessed to by anyone in the faculty lounge, would anyone argue that they were mere stray remarks? Had the defendant never granted tenure to an African American would that evidence be probative? Had tenured Faculty whose appearance gave no indication to their racial identity revealed that they were African American only to then be shunted aside, should that be ignored? It should be readily apparent that ample direct evidence of discriminatory animus exists on the part of voters who prevented Hammer from

acquiring tenure despite a clear majority being in favor of tenure, and others who did not vote, nonetheless had an impact on a few of the nay sayers.

Plaintiff offered proof of an hostile environment for gay and lesbian faculty members. First, Hammer offered evidence of being ostracized at law school social functions when he attended them with his partner. Second, and consistent with the first, Hammer offered evidence of anti-gay and anti-lesbian “humor” openly enjoyed in the faculty lounge.<sup>10</sup> What is significant is that faculty including J.J. White felt comfortable engaging in such banter openly and in front of their colleagues without fear of recrimination. While Hammer could not identify the speaker of the “affirmative action for straights” remark, J.J. White was present at the table and did not protest. Other remarks consisted of a senior faculty member repeatedly asking Hammer how his “wife” was. Other remarks included a senior faculty member expressing incredulity at learning that James Hathaway had a male partner during the hiring process. Other remarks included faculty guffawing that a lesbian couple that had been artificially inseminated must have used a turkey baster. Another faculty member openly expressed to his students that the visage of two men kissing was disgusting. In books that he has written and published he refers to homosexuals as a “pariah group” and individuals of “low status.” Even an internal study at UM concluded that gay, lesbian and transgender students and faculty felt ostracized or were fearful. (Exh. 29)

This testimony concerning the openness and breadth of anti-gay and anti-lesbian

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<sup>10</sup> While defendant complains that remarks contained in Hammer’s affidavit were not identified during his deposition, the court is referred to pp 246-250 of Hammer’s deposition. He indicated there were a number of times he heard stereotypical remarks concerning sexual orientation in the faculty lounge, and when he began identifying them in series, was cut off by counsel and was not permitted to complete his answer until Hammer’s counsel threatened to terminate the deposition. By then, Hammer had been successfully sidetracked by defense counsel’s tactics.

sentiment freely expressed in the hallowed halls of the law school was offered to show its consistency with the treatment of more senior gay faculty who had been closeted when tenured and who were out of favor after having come out. Additionally, Hammer studied the masthead of the law review publications going back decades. From information garnered from longstanding faculty and administrators, e.g., Whitmore Gray and David Chambers, Brian Simpson, Jessica Litman, Heidi Feldman, Deborah Malamud, Virginia Gordon and Robert Precht as well as information garnered from the mastheads and his own experience first as a student at the law school and later as a faculty member for 8 years, Hammer was able to set forth a case that demonstrated that no one who has been openly gay or openly lesbian has been tenured by the tenured faculty of the law school. It is not surprising that not a single faculty member has testified this conclusion is wrong. The few gay and lesbian faculty that have been hired with tenure, received favorable votes from a composite of the tenured and untenured faculty, inclusive of faculty overseeing clinical programs. Moreover, Hammer himself had to lobby for those individuals during the hiring process and met with resistance. (Hammer Affidavit 27-28). Perhaps most noticeable is the absence of any showing that any of the individuals who voted against tenure for Hammer (save for Lehman) ever voted in favor of an openly gay faculty member.

Thus, while defendant only speaks of a single remark in order to characterize the evidence of discriminatory animus, the court can readily see there was far more to it. The evidence of Kyle Loge perjuringly concealing his fundamentalist Baptist beliefs and the fact that he not only attended a church that embraced these beliefs, but taught Sunday School there as well along with his wife is consistent with this aura. He concealed these beliefs (that

homosexuality is an abomination and a sin against God) in the context of being questioned about his attitude about homosexuality and his reasons for voting against tenure. Carl Schneider actively concealed his repeatedly published belief that homosexuals should not be permitted to marry. It is not so much that he held that belief, nor that he published on it that is of concern, but rather that in the context of being questioned about his beliefs and his reasons for voting against tenure, he chose to conceal those activities and beliefs. (Schneider, 24-25, 29)

The list of such evidence is long. Its acknowledgment by defendant in its brief is lacking. Hammer's direct evidence of discriminatory animus is contained in the hostile environment evidence, the hiring history, the openly hostile remarks, the demeaning attitudes, the social ostracization, and the direct espoused deprecation of gay and lesbian life.

## **2. Circumstantial evidence of discrimination**

Given the voluminous evidence demonstrating anti-gay animus by the tenured faculty, the requirement that Hammer be constrained by a *McDonnell Douglas* analysis is lacking. *Harrison v. Olde, supra* at p 610. Further, since this issue was not briefed below, and since Hammer's discussion of evidence is in response to what was briefed below, it would be unfair to require that Hammer now satisfy such a burden based upon evidence offered for a different purpose.<sup>11</sup>

Nonetheless, Hammer can demonstrate a *prima facie* case of discrimination based upon sexual orientation. His proofs do not amount to a hunch, such as those in *Fonesca v. Michigan*

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<sup>11</sup> Hammer may not now use evidence that was not used below even if such evidence is responsive to this new-found briefing.

*State University*, 214 Mich App 28, 542 NW2d 273 (1995) where the Plaintiff had failed to offer any evidence of discriminatory motive in a case involving the refusal to admit an individual to an educational program. As can be seen by the prior discussion there is substantial proof of wide-spread and open hostility to gay and lesbian faculty.

Defendant, as it has consistently done in the past, continues to make statements without analysis or reference to any evidence before the court to demonstrate a defect in Hammer's case. It states (at page 22) that "the Court of Claims drew compound inferences from inadmissible facts and in several instances nonprobative material to conclude that Hammer had raised a triable issue as to whether a sufficient number of law faculty were motivated by homophobia in denying Hammer tenure." First, this claim is not premised upon being able to show homophobia. Rather, this claim is premised upon bigotry. Second, the defendant fails to identify what inferences it speaks of, what compound inferences were made and what evidence it claims the court relied upon that was nonprobative. This is the same type of argument made below where the moving party offered no evidence whatsoever to support its position and claimed Hammer must disprove propositions that are ill-defined and unsupported by the moving party.

Assuming *arguendo* that Hammer should be put to this burden (*McDonnell Douglas*) for the first time on appeal, it is nonetheless clear he has proffered a *prima facie* case. First, defendant now concedes that Hammer had a reasonable expectation that he would be free from anti-gay bias in, among other things, the tenure process. Thus a contractual right existed based upon pre-employment promises and the defendant's own published policies and by-laws. Second, Hammer has offered evidence that his sexual orientation was a factor in the way he was

treated, both before and during the tenure process. He has demonstrated that he was qualified for tenure and that he was turned down. If *McDonnell Douglas* is to be applied, the defendant then has the burden of articulating a legitimate, non-discriminatory reason for its actions.

Hammer concedes that the nay-sayers have articulated reasons which, if believed, would satisfy that burden.

A perusal of the evidence discussed above demonstrates the pretextual nature of the nay sayers alibis. The evidence discussed under the “direct evidence” section, serves equally well to demonstrate the pretextual nature of their alibis. Friedman told the tenured faculty in the secret meeting that Hammer was not and would not become a leader in his area and a few weeks later wrote to his colleagues at another university advising them that Hammer was a leader in his area and was a mover and a shaker. Logue wrote to Hammer about his scholarship and was complimentary and yet he voted against Hammer based upon his scholarship. Lehman denied ever having been publicly accused of being homophobic, only to retract the testimony when confronted with evidence to the contrary. Schneider denied having an opinion about same sex marriage when he knew full well that he held himself out as an expert and had written repeatedly in opposition. Clark – with whom Hammer interacted under circumstances where Clark would espouse on homosexuality gratuitously and in a way Hammer found to be offensive (Hammer Affidavit ¶¶ 67 and 68) – claimed to be in favor of “choice” on the issue of abortion. He, like the others, did so under oath and knowing the statement to be false in that he had recently published an article in the *Ave Maria Law Journal* espousing the opposite view. (Exh. 25)

Defendant seeks to immunize itself from liability by suggesting that the defendant’s hire with tenure of a lesbian couple and a gay faculty member is conclusive evidence of its lack of

bias. Yet it ignores that it has offered no evidence to show that those who voted against Hammer voted in favor of any of the other gay and lesbian faculty. Unlike Hammer who sought tenure internally, those were individuals who were hired with tenure from other universities. The process was different for them – more open – and non-tenured and clinical faculty participated in the decision as well. Defendant ignores that Hammer had to lobby for them. Defendant ignores that the lesbian couple voluntarily left the defendant’s employ and according to Hammer – who regularly interacted with them – it was because they did not feel welcome. Defendant ignores that Hathaway chooses to live in Arizona and travels to Ann Arbor for approximately 8 weeks out of the year for which he is paid \$130,000 plus benefits (Hammer Affidavit ¶¶ 46-47). Hathaway denies any disparity in his treatment but Hammer has provided specifics from his own personal observations. (Hammer Affidavit ¶¶ 40-46)

Defendant consistently ignores the evidence that favors Hammer’s claim. Contrary to the mandates of this court, defendant constantly invites this court to weigh the competing evidence. For example, in instances where its nay sayers have testified inconsistently or at odds with their own writings, defendant – rather than acknowledging a conflict in testimony exists – invites the court to resolve the inconsistency in its own favor. The lower court’s analysis of this case on the record was correct. Defendant does not seek to challenge that analysis directly, but rather presents new arguments to this court in an effort to avoid liability. The court should not reward such behavior.

**3. There was compelling evidence of faculty predisposition to discriminate.**

While defendant continues to maintain that 14 tenured faculty opposed Hammer's tenure, the notes of the meeting maintained by the dean's secretary – and the only written record – demonstrates only 12 opposed to Hammer's tenure. (Exh. 8) Defendant identifies Lehman, Friedman, Herzog, Clark and Schneider as the tainted votes challenged by Hammer. (Defendant's Brief on Appeal at pp 24-27) In so doing the defendant ignores the evidence respecting Kyle Logue apparently giving a tacit nod to the evidence of overt anti-gay animus. Also ignored is the testimony that a few nay-sayers who voted against tenure did so based upon the dissent of J.J. White on the tenure committee. (see, e.g Herzog at 18) As for Lehman, defendant again emphasizes the wrong point. The point made respecting Lehman was that in the context of being questioned about his motives in this case he knowingly falsified his testimony when he first denied having been publicly accused of homophobia, only to retract the statement when confronted with the truth. It is the act of concealment that is significant. The discussion respecting Herzog's vote is incomplete and is deliberately misleading.

Defendant seeks to deliberately mislead the record respecting what tenure meeting Herzog was speaking of when he said he relied on a ghostly visage of Tom Kauper giving a speech. No reference to the transcript is made. Defendant claims it is unclear whether Herzog was addressing the 2000 tenure meeting or the 2002. This is simply untrue. First, the vote in 2000 was to defer tenure consideration; in 2002 it was to deny tenure. More importantly, the testimony cited by Hammer to the effect that Kauper – whose speech Herzog relied upon – never spoke against Hammer's tenure was clearly concerning the 2002 tenure meeting. Defendant's Brief on Appeal ( in discussing the Kauper issue) states as follows:

“Hammer fails to remind the court, however, that there were two tenure

considerations. The testimony Hammer relies upon to claim that Herzog's vote was biased or pretextual conveniently fails to clarify whether Herzog was referring to the 2000 vote or the 2002 vote."

(Defendant's Brief on Appeal at p 26)

**Since Hammer had not yet filed his brief it is difficult to understand in what way Hammer had failed to remind the court of anything.** If this alleged lapse on Hammer's part was to have occurred in the trial court, then this statement by the defendant is a blatant lie. Attached to Hammer's trial court briefs were the pages of Herzog's deposition which reveal the following questioning:

Q. I see. You indicated earlier that you were impressed with the minority report of JJ White in 2002?

A. Yes.

\* \* \* \* \*

Q. Okay. How about the senior most anti-trust person on the faculty? Who would that have been?

A. I guess Tom Kauper.

**Q. Were you present when he spoke about the tenure application during the tenure meetings?**

**Mr. Seryak: In?**

**Q. In 2002?**

**A. Yes.**

Mr. Seryak: Object for lack of foundation.

Q. Please answer the question. Did he speak favorably on the tenure application?

(Herzog deposition at pp 14-15). The testimony continued concerning Kauper's statements at this meeting he never attended and there was no question but that it was the 2002 meeting being discussed because defense counsel made certain that the witness understood which meeting was in question.

Defendant claims Schneider's beliefs respecting gay marriage are not disclosed in his writings. A review of Exhibit 22 debunks this bald assertion. Further, a reading of Exhibit 21, a report to which Schneider subscribes as a member of that board, is critical of gay and lesbian couples raising children (Id. at 24, 39 -40) and recommends a five year moratorium on same sex marriage while further "study" is done (Id. at 14, 42-43)

This entire section of defendant's brief is an illustration of the misapplication of the requirement that all reasonable inferences be drawn in favor of the *nonmoving party*. Defendant instead draws all inferences in its own favor and seeks to have the court weigh the evidence contrary to applicable case law. *Lytle v. Malady*, 458 Mich. 153. 176 (1998); *Miracle Boot Pull Co. V. Plastray Corp.*, 57 Mich. App 443, 445; 225 NW2d 800 (1975).

**4. Defendant should not be allowed to raise the issue of pretext for the first time on appeal.**

Plaintiff has briefed the issue of pretext above for reason that the proofs also were proofs relied upon the show lapses in credibility. Such analysis is not required where direct evidence of

discriminatory animus is offered and the analysis is one of mixed motive. *Harrison v. Olde*, 225 Mich App 601, 610; 572 NW2d 697 (1997) It is difficult to perceive how the lower court erred in failing to consider an issue that was not raised.

**III. FAILURE TO STRIKE HAMMER’S AFFIDAVIT AND MILLER’S AFFIDAVIT WAS NOT ERROR, AND EVEN IF ERROR DOES NOT REQUIRE REVERSAL IN THAT THERE IS SUFFICIENT EVIDENCE APART FROM THOSE AFFIDAVITS TO JUSTIFY THE DECISION OF THE LOWER COURT AND THE LOWER COURT ANNOUNCED IT WOULD DISREGARD INAPPROPRIATE SECTIONS OF THE SAME.**

First, defendant claims the affidavits fail to conform to MCR 2.116(G)(6) and 2.119(B). It does not, however, indicate the manner in which the affidavits do not conform to the rule. The affidavits contain all of the required recitals. While Hammer’s affidavit includes reference to information garnered from some other people, it identifies those people and the fact that they are all employees of the defendant. It also identifies publications of the defendant – all quite clearly exceptions to the hearsay rule. As for the James Martin information, Hammer became a student at UM shortly after Mr. Martin passed away. His passing was a topic of discussion among faculty and others and the information came to Hammer from faculty. This is not hearsay. MRE 801(d)(2).

Defendant seeks to have paragraphs 8 and 9 of Hammer’s affidavit stricken as hearsay. Those paragraphs describe the verbal offers and negotiations that took place between Hammer and various law schools. They are offered to show what was offered to Hammer and are not hearsay by definition. MRE 801©) They are not being offered to prove the truth of anything. Only that certain offers were made. Furthermore, contrary to defendant’s assertion, they are not

inconsistent with his deposition testimony in any manner. Defendant's attack on paragraph 29 of Hammer's affidavit is feckless. Hammer was present and observed the vote of tenured, non-tenured and clinical faculty that resulted in an offer being made to Jane Schacter. He indicated in his affidavit essentially that if the non-tenured faculty votes and clinical faculty votes were not counted, Schacter would not have had sufficient support for an offer. This was from his personal observation. Plaintiff would concede that paragraph 30 is one of opinion, but would assert that it is relevant and helpful in discerning the atmosphere at the law school. (MRE 701) It is consistent with the Defendant's own report respecting this atmosphere. (Exh. 29) In any event, it hardly was a point on which the lower court's ruling turned, and in fact the lower court indicated it would disregard such expressions of opinion. Paragraph 23 has as its source, David Chambers a faculty member of the Defendant, Paragraph 24 falls within the same analysis as paragraph 30 – it is opinion but may well be helpful since it was developed over a period of 3 years as a student and 8 years as a faculty member. (MRE 701; see *Heath v. Alma Plastics Co.*, 121 Mich App 137, 142-143; 328 NW2d 598 (1982))

Paragraph 32 is not conclusory and is far broader than described by defendant. It is responsive to the affidavits filed by Brody and Schacter which are inconsistent with their prior statements to Plaintiff. Indeed their affidavits are untrue. Brody and Schacter came to UM with tenure. UM is a far more prestigious law school than Wisconsin. They abruptly left Michigan after buying a home in Ann Arbor and telling Hammer they did not fit in there. They filed affidavits stating that they did not say that to Hammer and that they left because they missed their close friends at Wisconsin. Before arguments, it was learned that they immediately upon their return to Wisconsin sought positions at Stanford, thousands of miles from Wisconsin, and

at the time they were being considered for the Stanford positions, provided the affidavits to UM. (This information was obtained from internet websites and was shared with the lower court.

Defendant's failure to comprehend the hearsay rule is the primary reason for its motion and this issue on appeal. A prime example is the "turkey baster" remark. Defendant asserts that the remark is hearsay. Hammer of course does not seek to prove that the artificial insemination was so accomplished. The conversation attested to by Hammer occurred in the kitchen area of the faculty lounge. These were words Hammer heard spoken, not words he was told of.

#### **IV. HAMMER'S DETRIMENTAL RELIANCE CLAIM IS MOOT.**

Since the application for leave to appeal was granted, defendant abandoned its claim that Hammer did not have a reasonable expectation not to be discriminated against because of sexual orientation in, among other things, his tenure process. This court need not consider, therefore, the alternate claim that even if he did not have such a reasonable expectation, defendant should be estopped from so claiming because he detrimentally relied on those assurances. Given defendant's new position, Hammer has no need for an alternate theory of liability.

#### **CONCLUSION AND RELIEF REQUESTED**

This matter came before this court on an Application for Leave to Appeal. Defendant had twice argued its motion before the Court of Claims and had in no way been impeded from

raising any and all issues it believed were pertinent. In applying for leave to appeal, defendant focused in this court, as it had in the lower court, on its centerpiece – the claim that the extensive and repeated, written and oral, assurances of non-discrimination in all matters affecting Hammer’s employment inclusive of the tenure process, did not provide a legal basis for a claim, i.e. there was no enforceable “reasonable expectation.” The briefing as and arguments focused on that issue, but covered other more minor issues as well. Nowhere in its briefing in the Court of Claims did defendant urge a *McDonnell Douglas* burden shifting analysis of this case.

Once leave was granted, defendant promptly abandoned its centerpiece issue and instead, devoted almost its entire argument here to issues and analyses not raised in the lower court. The issue of the quantum of proofs took 1 ½ pages of briefing in its initial brief. It took 3 pages of briefing in its rehearing brief. It is now the central focus of this appeal. The palpable unfairness of this “bait and switch” tactic should be readily apparent. Hammer is now called upon to respond to issues not raised below, but is constrained in responding to those issues to citing this court to the evidentiary record made below in responding to decidedly different arguments. It is as though Hammer was told he would be playing a game of flag football, only to show up for the game and be informed that it is actually ice hockey that is being played.

Defendant has consistently ignored the rules that apply to summary disposition motions as well as the rules of this court on appeals. It’s Statement of Facts is devoid of any reference to facts supportive of Hammer’s position. (See MCR 7.212(C)(6) It calls upon this court to weight evidence. It asks this court to draw inferences in its favor rather than Hammer’s. It asks this

court to determine issues of credibility all contrary to the mandates of the rule. *Lytle v Malady*, *supra*. In essence, it has made its “closing argument” rather than a motion under MCR 2.116(C)(10).

Hammer has demonstrated an abundance of evidence indicating hostility to gay and lesbian faculty (and students) which is consistent with the defendant’s own Task Force Report on the subject. Hammer has demonstrated a callous disregard for the feelings of gay and lesbian faculty members by virtue of an atmosphere that condones grotesque and anti-social anti-gay and anti-lesbian humor in the faculty lounge. Hammer has demonstrated that among the minority of those who opposed his tenure are individuals who actively concealed their anti-gay animosity when questioned about such beliefs. That they did so in the context of being deposed is a clear indication that they were concerned about someone drawing a connection to their vote on Hammer and their belief set. How can one who participates so fully in their religion by attending church regularly and teaching Sunday school with one’s spouse regularly, who believes that homosexuality is a sin against God and an abomination, be judged a fair voter when the very facts that might lead one to suspect bias are actively concealed. How can one who believes a show of affection between men is disgusting, and both write and lecture to that affect be an impartial decision maker.

The evidence in this case is such that this court should not find that it is impossible for Hammer to prevail. *Lytle v Malady*, *supra*, at 589. Hammer responded appropriately to the issues raised below. If defendant is to now seek dismissal on new issues, it should first be presented to the court below with a full opportunity given to Hammer to respond. Hammer

respectfully requests that this court affirm the lower court and remand this case to the lower court for trial.

Respectfully submitted,

**GREEN, GREEN, ADAMS & KENT, P.C.**

By:

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Dated: January 15, 2007