

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER

Plaintiff,

Case No. 04-241 MK

v.

Hon. James R. Giddings

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

Defendant.

GREEN, GREEN & ADAMS, P.C.
Philip Green (P14316)
Attorneys for Plaintiff
900 Victors Way, Suite 240
Ann Arbor, MI 48108
(734) 665-4036
(734) 665-1075 (Fax)

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.
Richard J. Seryak (P26152)
Michael J. Hodge (P25146)
Charles T. Oxender (P57440)
Attorneys for Defendant
150 W. Jefferson Avenue, Ste. 2500
Detroit, MI 48226
(313) 963-6420

DEFENDANT'S MOTION FOR RECONSIDERATION

NOW COMES Defendant, Board of Regents of The University of Michigan, through its attorneys, Miller, Canfield, Paddock and Stone, PLC, and in support of this Motion for Reconsideration filed at the suggestion of the Court, states as follows:

1. Discovery in this case closed on February 17, 2006. On February 17, 2006, Defendant filed a Motion for Summary Disposition and a Motion To Dismiss For Violations of MCR 2.114. Because the Court directed that all dispositive motions be filed and heard prior to Case Evaluation, Defendant's dispositive motion was noticed for hearing on March 16, 2005. Defendant received Plaintiff's Brief In Opposition to the Motion for Summary Disposition and Plaintiff's Affidavit on March 8, 2006. Defendant filed a reply brief in Support of the Motion for Summary Disposition and a companion motion to Strike Plaintiff's Affidavit because it failed to comply with the requirement of MCR 2.116(G)(6) and 2.119(B).

2. On March 16, the Court denied all three motions. Thereafter, Defendant filed a Motion for Stay pending an interlocutory appeal. At a hearing before this Court on April 12, 2006, the Court informed the parties that it was willing to entertain a Motion for Reconsideration and set a briefing schedule for the parties.

3. On the basis of the following considerations and the supporting brief, exhibits, deposition excerpts, affidavits and related evidentiary materials filed herewith, Defendant respectfully urges the Court to reconsider its prior rulings and to enter summary disposition dismissing this matter in its entirety.

4. Pursuant to MCR 2.116(I), the court "shall render judgment without delay" when the record demonstrates that there is no genuine issue of material fact. (Emphasis added). There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Lytle v Malady (On Rehearing), 458 Mich 153, 175 n 23 (1998), citing Anderson v Liberty Lobby, Inc, 477 US 242, 249-250; 106 S Ct 2505, 91 L Ed 2d 202 (1986). The nonmovant must do more than present some evidence on a disputed issue; if the nonmovant's evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. Id., 175 n 23 (1998). The nonmovant cannot rely on the hope

that the trier of fact will disbelieve the movant's denial of a disputed fact or show that there is some metaphysical doubt as to the material facts, but must present affirmative evidence to defeat a properly supported motion for summary judgment. McCart v Thompson, Inc, 437 Mich 109, 115 n 4 (1991).

5. "Where the burden at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists..... If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." Quinto v Cross and Peters Co, 451 Mich 358, 362-363, 574 NW2d 314 (1996).

6. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. Maiden v Rozwood, 461 Mich 109, 121 (1999). Only evidence whose content or substance is admissible can establish the existence of a genuine issue of fact for trial; inadmissible evidence does not create an issue of fact. Maiden v Rozwood, 461 Mich 109, 123 (1999). A mere possibility that the claim might be supported by evidence produced at trial will not defeat the motion. All reasonable or legitimate inferences are to be resolved in favor of the nonmoving party. Kefgen v Davidson, 241 Mich App 611, 616 (2000); Hampton v Waste Mgt of Michigan, Inc, 236 Mich App 598, 602; 601 NW2d 172 (1999).

7. Hammer's claim that he had a "reasonable expectation" not to be discriminated against on the basis of sexual preference should be dismissed. Summary disposition is warranted as to this claim because the "legitimate expectations" theory of recovery does not extend to policies of nondiscrimination. Bankey v Storer Broadcasting Co., 432 Mich 438, 455-456; 443 N.W.2d 112 (1989); Dumas v Auto Club Insurance Association, 437 Mich 521, 531; 473

N.W.2d 652 (1991). Summary disposition is warranted as to this claim for the added reason that there is no genuine issue of fact for trial that the faculty who voted to deny Plaintiff tenure did so because of his scholarship. Plaintiff has adduced no probative evidence of discriminatory intent. Faculty who supported Hammer for tenure confirm that his sexual orientation was never a consideration in the tenure votes. Even if Plaintiff could identify evidence that any faculty were predisposed to discriminate on the basis of sexual preference, Hammer has presented no evidence that anyone *acted on* an alleged predisposition. Reisman v Board of Regents of Wayne State, 188 Mich App 526, 537; 470 NW2d 678 (1991) (To prove intentional discrimination, the plaintiff must show that the person who discharged him was predisposed to discriminate against persons in the affected class and actually acted on that disposition in discharging him.).

8. Summary disposition is warranted as to Plaintiff Count I for the added reason that courts are reluctant to interfere with the academic judgment of universities which they exercise in making tenure decisions. Absent clear and preponderant evidence of discrimination, Plaintiff's claims should be dismissed.

9. Summary disposition is warranted as to Plaintiff's claim of detrimental reliance in Count II for the reason that Plaintiff cannot satisfy the elements of promissory estoppel. Plaintiff's claim that he passed over more favorable offers from other law schools was flatly contradicted by his own deposition testimony. The facts of this case do not justify the court departing from the doctrine that promissory estoppel is cautiously applied. Derderian v Genesys Health Care Systems, 236 Mich App 364, 689 NW2d 145 (2004); Barber v SMH (US), Inc., 202 Mich App 366, 375-376; 509 NW2d 791 (1994).

10. Summary disposition is warranted as to Plaintiff's breach of contract claim for the reason that there is no genuine issue of material fact that (1) the University's Standard Practice Guides do not constitute a contract of employment; (2) there is no genuine issue for trial that

Plaintiff received notice of non-reappointment prior to his last year of employment at the University; (3) Plaintiff is estopped from asserting a breach of contract claim; (4) Plaintiff did not accrue eight years of service to acquire hearing rights under By-law 5.09; and (5) Hammer never worked beyond eight years to trigger Regent By-Law 5.09 which govern dismissals of tenured faculty. Conagra, Inc v Farmers State Bank, 237 Mich App 109, 141; 602 NW2d 390 (1999); Lakeside Oakland Development, LC v H&J Beef Co, 249 Mich App 517; 644 NW2d 765 (2002); Penny v ABA Pharmaceutical Co, 203 Mich App 178; 511 NW2d 896 (1994).

Having signed a contract of employment with Wayne State University in March, 2003, before he completed eight full years of service under the University's Standard Practice Guides, Hammer was not employed by Defendant at the time any hearing provisions of By-law 5.09 could apply.

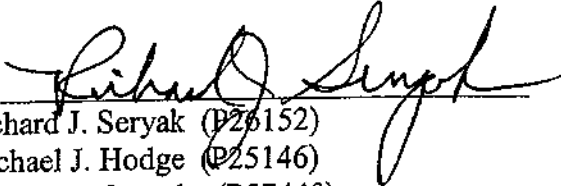
11. Summary disposition is also warranted as to Count III because the Faculty Handbook expressly reserved to Defendant the authority to interpret its policies and to determine whether Plaintiff received sufficient notice of nonreappointment, whether Plaintiff's leaves of absence during which he was not required to perform any duties counted as service time for purposes of By-law 5.09, and whether Plaintiff acquired the hearing protections of By-law 5.09. Thomas v John Deere Corp, 205 Mich App 91, 95 (1994).

WHEREFORE, Defendant, Board of Regents of the University of Michigan, respectfully requests that this Honorable Court grant its Motion for Reconsideration, dismiss Plaintiff's Complaint in its entirety with prejudice, and enter judgment in Defendant's favor as to all of Plaintiff's claims.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By:


Richard J. Seryak (P26152)

Michael J. Hodge (P25146)

Charles T. Oxender (P57440)

Attorneys for Defendant

150 W. Jefferson Avenue, Ste. 2500

Detroit, MI 48226

(313) 963-6420

Dated: May 17, 2006

DELIB:2726679.1\060548-00354

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER

Plaintiff,

Case No. 04-241 MK

v.

Hon. James R. Giddings

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

Defendant.

GREEN, GREEN & ADAMS, P.C.
Philip Green (P14316)
Attorneys for Plaintiff
900 Victors Way, Suite 240
Ann Arbor, MI 48108
(734) 665-4036
(734) 665-1075 (Fax)

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.
Richard J. Seryak (P26152)
Michael J. Hodge (P25146)
Charles T. Oxender (P57440)
Attorneys for Defendant
150 W. Jefferson Avenue, Ste. 2500
Detroit, MI 48226
(313) 963-6420

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION.

This case arises out of the denial of Peter Hammer's application for tenure at the University of Michigan Law School. Hammer was first evaluated for tenure in the normal course in 2000. When the Law School faculty did not recommend tenure in 2000, they afforded him a second tenure review in 2002. In both instances, Hammer failed to receive favorable support from two-thirds of the tenured faculty participating in the decision which was needed for a tenure recommendation to the Board of Regents. Hammer makes no claim that there were any procedural defects in the way in which his tenure file was evaluated or how the tenure committees performed their functions. In both reviews, Hammer did not receive tenure because his written scholarship did not satisfy the standards of the Law School.

Hammer asserts three claims in the Court of Claims. Count I alleges that Hammer had a "reasonable expectation" that he would not be discriminated against on the basis of his sexual orientation and that he was denied tenure in violation of the University's nondiscrimination policy. Count II alleges that Hammer relied to his detriment in accepting a faculty position at Michigan in 1995 when he had offers from other law schools. Lastly, Hammer alleges in Court III that he was not given notice of non-reappointment before his last year of employment and that because he was employed at Michigan for a total of eight years, he was entitled to the hearing procedures of Regent By-law 5.09. This By-law provides that full-time, tenure track faculty who have completed a total of eight years of employment cannot be terminated without a hearing. Hammer alleges that the failure to provide him with a hearing constituted a breach of contract. Hammer admits, however, that to be eligible for a hearing under By-law 5.09, the faculty member must have earned eight years of service without receiving any notice of non-reappointment (Plaintiff's Brief in Opposition, p, 27).

Following eleven months of discovery and 23 depositions (21 taken by Plaintiff and 2 taken by Defendant), Defendant Board of Regents of the University of Michigan filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and a corollary motion to strike the affidavit of Plaintiff filed in opposition to Defendant's dispositive motion. The undisputed facts showed that Hammer was expressly informed that the policy statements upon which he relies were not contractual, that the University could modify them at any time, and that the University had reserved unto itself the exclusive right to interpret the policies. Moreover, there was no genuine issue of fact for trial that the faculty who voted against tenure did so because Hammer's scholarship did not satisfy the standards of the Law School. There were two external reviewers critical of Hammer's work and no evidence that either reviewer had knowledge of Hammer's sexual orientation. Faculty who supported Hammer for tenure confirmed that although there was disagreement over the quality of his work, the faculty vote focused on his scholarship and that his sexual orientation was not considered. One gay faculty member voted against tenure because Hammer's scholarship did not meet the Law School's standards, and at least three other gay faculty explicitly denounced Hammer's claim that the Law School environment was biased against homosexuals. Those who *avored* Hammer for tenure saw no anti-gay bias on the part of any of the voting faculty.

The University also sought summary disposition of Hammer's breach of contract claim because nothing in the University's Standard Practice Guides or the By-laws awards tenure to a faculty member simply because he or she has been employed for eight years. Instead, By-law 5.09 and the Standard Practice Guides afford full-time faculty a just cause termination hearing only if each of the following is true: they (a) have not received a tenure review; (b) have not been notified before September 15 of their final year of employment that their appointment will not be renewed; (c) have completed a total of eight years of "service" as that term is specifically

defined in Standard Practice Guide 201.13; and (d) remain on the faculty beyond eight years so they can claim entitlement to 5.09 protections in the event of a subsequent attempt to terminate their employment. Here none of these criteria was met. There was no genuine issue of fact for trial that Hammer received not one but two tenure reviews and that he received a February 28, 2000 letter from Dean Lehman notifying him that the 2001-2002 academic year would be his terminal year. Hammer then requested in writing an extra one-year appointment to find other employment in the event he was denied tenure in 2002. His request was granted, and his last appointment ended in the spring of 2003. Hammer used the added year to secure job offers from the law schools at the University of Toledo, Maryland and Wayne State.

It was also undisputed that Hammer took research leaves for at least two semesters during which he was relieved of all teaching, administrative and service responsibilities and that these leaves did not count as service time for purposes of Regent By-law 5.09. There was likewise no dispute that just before teaching his last semester at Michigan, Hammer accepted a full-time faculty position at Wayne State and signed an employment contract with Wayne State to begin his appointment there on August 19, 2003. Thus, Hammer had accepted a full-time appointment at Wayne State and left the University of Michigan before the hearing provisions of By-law 5.09 could even apply.

In response to the University's motion, Plaintiff identified no evidence showing that any faculty member had a predisposition of bias against homosexuals. Moreover, Hammer identified no evidence showing that any faculty member *acted* on a predisposition against homosexuals in voting to deny him tenure. Plaintiff adduced no evidence disputing his knowledge that the 2002-2003 academic year was his terminal year; nor did he establish, as was his burden, that his leaves of absence in 1998 and 2000 counted as service time for purposes of By-law 5.09.

II. STATEMENT OF FACTS

A. Plaintiff's Hire At the University Of Michigan Law School.

Peter Hammer was hired by the University of Michigan in May, 1995, as an assistant professor at the Law School (25-26).¹ Before he began his employment at the University, Hammer made known to those who hired him that he was homosexual (214-215). Those who participated in the hiring decision, including then-Law School Dean Jeffrey Lehman who approved and issued the employment offer, knew or believed Hammer to be gay at the time he was hired (Ex. A; Lehman 5; Croley II, 5; Miller 33, 37-38). Dean Lehman was also responsible along with the faculty for the hiring of other full-time faculty Jim Hathway, Jane Schacter and Juliet Brodie, all of whom were openly gay (Affidavits of Jane Schacter and Julie Brodie; Hathway 20-25).

Hammer received a Faculty Handbook which set forth the criteria for achieving tenure: teaching, service and academic research (27-29). The Handbook further states:

The policies referred to in this handbook and the related *Regents' Bylaws*, *Standard Practice Guide*, and executive officer policy directives may be changed or terminated at any time by the University. Neither this handbook, the *Regents' Bylaws*, the policy directives, nor the SPGs establish or imply contractual obligations to any faculty group or individual faculty member that cannot be changed or terminated.

Should any provision of this handbook, *Regents' Bylaws*, executive officer policy directive, or the *Standard Practice Guide* require interpretation, the University, through the appropriate issuing unit, shall issue the interpretation. No one can rely on an oral statement or direction that is inconsistent with these written materials. [Ex. B].

Hammer does not dispute that the University retained the right to modify its Standard Practice Guides and the Regent By-laws (Plaintiff's Brief in Opposition to Defendant's Motion For Summary Disposition, p. 20).

¹ Unless otherwise specified by name, page references are to the deposition testimony of Peter Hammer.

B. Plaintiff's Tenure Review in 2000.

According to written policies of the Law School, faculty are considered for tenure in the fifth year of their employment [Ex. C]. The candidate must meet the standards of the Law School for teaching, service and scholarship (Howse II, 20-21). The most difficult to satisfy is the scholarship (Lehman 16; Payton 21). The candidate's work must be a significant contribution to legal scholarship, reflecting high intelligence, care and perception (Howse II, 45). The candidate must demonstrate the potential for being a leading scholar in his or her field (Friedman 27). External review letters are obtained from leading scholars at other peer universities to independently evaluate the candidate's scholarship (Lehman 14-15).

Hammer was considered for tenure in February, 2000 (36-37, 41). A tenure committee reviewed and assessed his teaching, service and scholarship. In a written report, the committee voted 3-2 against recommending Hammer for tenure (59). The tenured faculty then met twice in February, 2000, to deliberate and vote on Hammer's case (Lehman 6). Hammer did not receive the support of two-thirds of the tenured faculty participating in the decision, a requirement for tenure under the policies of the Law School (49). The faculty voted, however, to afford him a second tenure review in two years (45, 47, 49-50). Hammer understood that he was not granted tenure in 2000 and that there were concerns about his scholarship (47, 57, 61, 63, 65).

C. Hammer Is Notified Of A Terminal Appointment.

Following the faculty vote in 2000, Dean Lehman sent Hammer a letter confirming that the faculty had concluded that Plaintiff's research did not support a decision to grant tenure but were willing to afford him a second review (Ex. D). It was unprecedented at the Law School to allow a candidate two tenure reviews and an additional two years to enhance his scholarship (Ex. D; Frumkin 44). Dean Lehman's February 28, 2000 letter further notified Hammer that his

current employment contract would be extended to May 31, 2002, and that if he were not awarded tenure in 2002, "the academic year 2001-2002 will be your terminal year." (Ex. D).²

As noted in Dean Lehman's 1995 offer of employment to Hammer, Plaintiff's initial appointment was for three years, which was renewed for another three years through the 2000-2001 academic year (Ex. A). The 2000-2001 academic year would therefore be Hammer's terminal year of employment were he denied tenure in 2000 and no other agreement reached regarding the duration of his appointment (Ex. A, C, D). Because the Law School offered Hammer a second tenure review in his seventh year of employment, in 2002, Dean Lehman's February 28, 2000 letter notified Hammer both that he would receive an additional one-year appointment after his second three-year appointment expired in 2001 and that the additional one-year appointment was Hammer's terminal-year appointment.

Then in an email dated July 21, 2000, Hammer sought renegotiation of the terms of his employment status. He requested a two-year rather than one-year extension of what was left in his existing appointment, which would permit Hammer to remain on the faculty through the 2002-2003 academic year, even if he were denied tenure in the spring of 2002. The additional extension, according to Hammer, would both remove the burden of having to seek tenure and find alternative employment elsewhere at the same time during the seventh year, and also reestablish the "safety net" of an extra year enabling him to make plans if he was not awarded tenure in the second review (Ex. E). The email states:

"...My existing contractual relationship with the University makes it impossible to separate the tenure issue from the need to make plans for serious and substantial life changes in the event of the an (sic) adverse outcome. If not the actual intent of the original six year commitment with tenure consideration in your fifth year, then one of the primary virtues of the arrangement is the safety net

² The letter further advised Plaintiff that the tenure evaluation committee would consider his tenure case again in the 2001-2002 academic year, that internal and external reviews would be requested, and that an evaluation of his teaching and service would be prepared.

it provides, which permits one to mentally compartmentalize what you need to do to get tenure, from the issue of what plans you need to make if things do not work out.

* * *

My request is two-fold. First, I would ask that you interpret the faculty's decision to defer my tenure decision for two years as authorizing you to provide a two year extension of what was left on my exiting contract. In effect, this would reestablish the pre-existing safety net. If the faculty votes to extend tenure, then it becomes a non-issue. If tenure is denied, then it gives me a year to orchestrate what could be a very complicated family departure from Ann Arbor. Second, I would ask that you extend the loan period in the same fashion, so the decision whether to refinance can be based on the knowledge of whether or not we will be staying.

The primary downside for the Law School is the possible disruption for colleagues and students of having me around for an extra year in the unfortunate event that tenure is denied." [Ex. E].

With this email, Hammer was requesting an additional year, until 2003 rather than 2002, for time to find another job were he denied tenure in 2002 (209). Dean Lehman agreed with both of Hammer's requests [Lehman 20; Ex. F]. The Dean also established a support committee consisting of five faculty members to advise Plaintiff on his research, review drafts of his work and provide feedback (165; Lehman 8-9). Consistent with his July 21, 2000 email to Dean Lehman, Hammer received a two-year appointment through May 31, 2002, and a final one-year appointment through May 31, 2003 (Ex. F, G).³

D. Hammer Takes Research Leave To Improve His Scholarship.

Hammer was relieved of teaching, administrative and service responsibilities in the fall semesters of 1998 and 2000, so that he could devote full time to his research (Ex. D; 162-164; Lehman 9-10, 27).

Part II of University Standard Practice Guide 201.13 states:

II. Rules

A. By-law 5.09 Time.

³ Hammer admits receiving these appointment notices (210-211; Ex. G).

Time spent with a University appointment will be counted toward the acquisition of the protections of Regents' Bylaw 5.09 by the accumulation of years of service, if and only if each of the following title, rank, appointment fraction, and service conditions are met:

(Ex. P). For a semester to count towards accrual of eight years of "service," the semester must be spent (a) in residence at the University, (b) in paid duty off campus, (c) as sabbatical or scholarly activity leave, or (d) as other scholarly leave provided the unit agrees in writing, with written approval from the provost, that such leave will be counted (Ex. P). A research leave qualifies as a "Scholarly Activity Leave" referred to in subpart (c) (and further defined in SPG 201.30-4) and thus counts toward "service" only where the faculty member accepts "prestigious fellowships" or a "temporary appointment at another institution" (Lehman 9-13; SPG 201.30-4, Ex. 3 to Defendant's Reply Brief in Support Of Motion For Summary Disposition). The leaves Hammer took in 1998 and 2000 were not for the purpose of accepting a prestigious fellowship or to teach at another institution (314; Lehman 10). Neither the 1998 leave nor the 2000 leave was supported by a written agreement approved by the Dean and the Provost as required by SPG 201.13 to count toward By-law 5.09 protections (Lehman 10-13).

Hammer was also afforded a sabbatical leave during the Fall, 2001 term and was assigned to teach only one course (rather than the normal two) in the winter, 2001 term (Lehman 9-10).

E. Plaintiff's 2002 Tenure Review.

Law School Professor Rob Howse chaired the evaluation committee for Plaintiff's 2002 review (Howse II, 6). Howse cooperated with Hammer in assembling Hammer's scholarship and obtaining both internal and external reviews (170, 172-173; Ex. H). Howse invited Hammer to identify external reviewers whom Hammer preferred the committee to contact or not to contact. Hammer did not identify any external reviewers whom he preferred the committee not

contact (Howse II, 50-51; Ex. H). The committee members read all of the articles which Hammer submitted (Howse II, 18). Hammer was permitted to respond to negative comments from reviewers before the faculty vote (Howse II, 24; Courant 76). In their report, three committee members recommended tenure, one member recommended tenure in a separate opinion, and one member dissented (Ex. I).⁴

The Law School tenured faculty met twice in February, 2002, to discuss and deliberate on Hammer's tenure application (Caminker 18; Lehman 18, 41). Each faculty member received Hammer's tenure file, which included his published articles, internal and external review letters, and the tenure committee report (Howse I, 5-7, 9-10). The faculty continued their deliberations and voted at the second meeting on February 28, 2002. The second meeting lasted nearly six

hours and deliberations focused on the quality of individual pieces of Plaintiff's scholarship (182; Howse I, 13-14, 20; see also Ex. 8 to Plaintiff's Brief in Opposition, notes of February, 2002 faculty meetings). The discussions were marked by "penetrating criticism" of Hammer's work (Green 35). Of the 32 members present, only 18 voted in favor of tenure, while 14 were not favorable (Caminker 43-44; Complaint ¶ 27; Ex. L). Hammer therefore failed to receive the favorable vote of two-thirds of the participating faculty which is a prerequisite for the Law School to recommend him for tenure (182). After the meeting, Dean Lehman telephoned Hammer at his home to tell him that he had not received the two-thirds faculty support to justify an affirmative recommendation of tenure (182).

⁴ The written evaluation of the tenure committee is not binding on the faculty, who are expected to make an independent review of the candidate's scholarship (68-69; Lehman 17-18). The faculty may agree or disagree with the tenure committee's recommendation regarding tenure for the candidate, and it is not uncommon for faculty members to disagree with one another about the significance of certain pieces of a candidate's scholarship (69).

F. Hammer Was Denied Tenure Because of His Scholarship.

Hammer has no firsthand knowledge about the faculty deliberations, what was said in the faculty meetings, or why faculty voted the way they did (70, 181, 201-202, 204-205, 230-231, 299). Hammer does not know that any faculty considered his sexual orientation in deliberating on his tenure application (86). Hammer admits that Associate Dean Evan Caminker summarized for him the concerns voiced at the faculty meeting about his scholarship (197-198, 202). Dean Lehman and other faculty also told Hammer that there were no discussions or mention of his being gay in the evaluation of his tenure case (201-202).

Under the Law School's written standards, the candidate's scholarship must demonstrate significant achievement and make a significant contribution to legal scholarship (Ex. C, p. 6). Faculty who voted against tenure did so because Hammer's scholarship did not meet the Law School's minimum standards (Ex. I, Separate View of J.J. White; Caminker 6, 48-50; Herzog 9-11, 18; Logue 8; Clark 13; Ben-Shahar 17, 19; Friedman 17-18, 26-29, 59; Lehman 72-73). The negative voters were influenced by two external review letters, one from Professor Einer Elhauge of Harvard University, who wrote that Hammer's scholarship did not meet Michigan's standards, and one from James Blumstein from Vanderbilt University, who was equivocal as to whether Hammer should receive tenure (See Ex. 17 to Plaintiff's Brief in Opposition To Defendant's Motion For Summary Disposition; Caminker 9-10; Friedman 26-27; Herzog 10-11; Logue 8-9). Though he did not vote, Professor J.J. White's written dissent focused on Hammer's scholarship and was influenced by Elhauge's review. In contrast to some favorable reviews, which Professor White felt were short and conclusory, Elhauge gave a detailed analysis of the two articles which Hammer was primarily relying upon in his tenure file (Ex. I, Separate View of J.J. White). Professor Ben-Shahar, who voted against tenure, was persuaded from his own review of Hammer's writings and from Elhauge's assessment that Hammer's work did not satisfy

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Michigan's standards (Ben-Shahar 17-19). There was no evidence that reviewers Elhauge and Blumstein had any awareness of Hammer's sexual preference. In response to Defendant's motion, Plaintiff asserted without any evidence that he struck Elhauge from the potential pool of reviewers when Hammer was first considered for tenure in 2000. It is undisputed, however, that Hammer was expressly given the opportunity to strike Elhauge in 2002 and voiced no objection (Howse II, 50-51; Ex. H). Moreover, it was Rob Howse, the chair, who decided to solicit a review letter from Elhauge, and Howse voted in favor of tenure (Howse II, 51).

Hammer had two primary articles in his tenure file, one in the *Columbia Law Review* and one in the *Michigan Law Review*. They were not regarded as making a significant contribution in the field or evidencing sufficient care and craft as to predict that Hammer would become a leading scholar (Frier 5-6; Caminker 9-10, 48-49; Ex. I). Some faculty found Hammer's written work vague, "opaque," very difficult to read and lacking in any particular insight which constituted a significant contribution to legal scholarship (Frier 5; Clark 13; Herzog 10). Some were also influenced by the critical internal reviews of Professors Ben-Shahar and Sallyanne Payton, even though Payton favored tenure because of Hammer's teaching and service (Caminker 13; Herzog 10-11, 18; Logue 9; Payton 21). Kauper, who also reviewed Hammer's articles, said that his endorsement was not enthusiastic (Kauper 25-26). Some faculty felt that the report of the tenure committee itself was a "red flag" because it reflected a three-member majority, had a separate concurring opinion and a separate dissenting opinion, and that the majority report stretched to make a positive case for awarding tenure (Frier 4, 6; Herzog 18). Indeed, tenure committee chair Rob Howse tried to issue one report recommending tenure and could not understand why Professor Malamud was insisting on her own separate report (Howse II, 7, 43-44). Though she concurred, Malamud's report contained criticisms of Hammer's work (Ex. I; Miller 40).

Associate Dean Evan Caminker read Hammer's entire file, including both the internal and external review letters and carefully analyzed how the letters "dovetailed" with Caminker's understanding of Hammer's work (Caminker 6-7). Caminker found the external reviews of Elhauge and Blumstein to be quite helpful because of their expertise in the subjects in which Hammer taught and had written (Caminker 9, 11). Caminker voted against tenure because he concluded that Hammer's work did not demonstrate sufficient quality to satisfy Michigan's tenure standards (Caminker 6, 48-49). Hammer still regards Caminker as a friend (277-278).

Disagreement over Hammer's candidacy centered on his research and writing (Howse I, 14). Bruce Frier, who himself is openly gay, voted to deny Hammer tenure based upon Hammer's scholarship (Frier 4-6). David Chambers, also openly gay, recommended Plaintiff for tenure but told Hammer that sexual orientation was not addressed during the faculty deliberations and that some of the faculty had questions about Plaintiff's writing (271-272). Faculty who voted in favor of tenure confirm that nothing was said or occurred during the deliberations to indicate that Hammer's sexual orientation was ever considered (Howse I, 14, 20; Reimann 14, 19-21; Green 37; Payton 13).

G. Plaintiff's Actions Following The Denial Of Tenure.

1. Knowing of His Termination, Plaintiff Interviews At Other Law Schools, Receives Three Offers And Accepts Employment At Wayne State University.

Shortly after the faculty recommended against tenure, Hammer told his secretary: "I was fired . . . I didn't get tenure. They denied me tenure" (192). Hammer also states that "after learning of the tenure decision at Michigan was when I committed to teach an overload course at Toledo and was also engaging in the other active job search" (129). Hammer's plan was to obtain a full time tenured position starting in September, 2003 (115, 117, 120, 131-133, 143). He also interviewed for teaching positions at the University of Maryland and Wayne State

University. At an interview dinner with faculty from Wayne State held on October 30, 2002,

Hammer described his intentions:

I explained that it was my belief that the [Michigan Law School tenure] decision was not justified, but it was my immediate objective to find a different professional employment where I anticipated to be productive and successful.
(148)

Hammer received offers from all three schools (118, 120, 122, 125, 157). Toledo offered him a position with tenure (310). The offer from Maryland contemplated that Plaintiff would receive tenure the year following his hire (342-343).

On January 2, 2003, Hammer sent emails to the deans of the Toledo and Maryland law schools informing them that he had accepted Wayne State's offer (151, 154, 335-336; Ex. J). Hammer used the offers he received from Toledo and Maryland to induce the Dean at Wayne State to increase its compensation offer and to seek tenure and promotion for Hammer in his first year of employment (345; Ex. K).

In a letter dated January 17, 2003, to the Michigan Law School faculty, Hammer wanted to share with them "before leaving" his scholarly efforts over the past two years. Hammer introduced the letter as follows:

As most of you know, after eight years, this is my final semester at the Law School. Last year I was considered for tenure. On a 4-1 vote, the Standing Tenure Committee recommended the granting of tenure. Thirty-two of the forty-two members of the tenured faculty met last February to decide the question. After ten hours of deliberation over two evenings, the faculty voted 18-to-14 in favor of granting tenure, short of the required two-thirds majority. (Ex. L).

Hammer did not request or select any classes for the 2003-2004 academic year, knowing that he would not be teaching for that year (293-294; Caminker 136). Hammer had conversations with Dean Lehman and Associate Dean Caminker that made clear that the 2002-2003 academic year would be his final year with the University (Lehman 21; Caminker 37, 134-136). He states that the winter of 2003 was his final semester at the Law School because he had

accepted employment at Wayne State University (349). On March 13, 2003, Hammer signed a written employment agreement with Wayne State University, which committed him to teach at Wayne State for the 2003-2004 academic year (Ex. M). Hammer received tenure at Wayne in May, 2004 (106-107).

2. Plaintiff Files a Grievance With the Law School.

Near the start of the fall 2002 term, Hammer filed a grievance, which was heard and denied by a faculty Grievance Review Board. The grievance challenged the standards by which his tenure application was considered. In his grievance, Hammer acknowledged that the Law School "falls further along the spectrum of democratic faculty involvement in tenure decisions than some other schools or departments" (328; Ex. N). Apart from his grievance, Hammer was invited to submit evidence of his discrimination complaint to the Dean of the Law School, the Provost, or the University's Office of Equity and Diversity but failed to do so (Caminker 144-145; Courant 71, 76-77; Lehman 40-41, 101). Hammer likewise submitted no complaint of discrimination to the University's Executive Director of Human Resources & Affirmative Action, as provided in the Faculty Handbook (Ex. B).

III. ARGUMENT

A. Summary Disposition Should Be Entered Dismissing Plaintiff's Claim That He Had A "Reasonable Expectation" Not To Be Discriminated Against On The Basis of Sexual Preference.

1. The "Legitimate Expectations" Theory of Recovery Does Not Extend To Policies of Nondiscrimination.

Hammer alleged that he had a "reasonable expectation" to be treated without discrimination based upon his sexual preference and that this expectation was violated when he was denied tenure (Complaint ¶39). The University of Michigan Faculty Handbook for Instructional and Primary Staff, which Plaintiff received, states that the University "is committed to a policy of nondiscrimination and equal opportunity for all persons regardless of race, sex,

color, religion, creed, national origin or ancestry, age, marital status, sexual orientation, disability, or Vietnam-era veteran status in employment, educational programs and activities and admissions. Inquiries or complaints may be addressed to the University's Executive Director of Human Resources & Affirmative Action, Title IX / Section 504 Coordinator, 4005 Wolverine Tower, Ann Arbor, MI 48109-1281, 313/763-0235, TDD 313/747-1388, FAX 313/763-2891." (Ex. B). This policy statement, however, does not provide Plaintiff with a cause of action enforceable in court.⁵

In Bankey v Storer Broadcasting Co., 432 Mich 438, 455-456; 443 N.W.2d 112 (1989), the Court stated:

The very definition of 'policy' negates a legitimate expectation of performance. . . . In other words, a 'policy' is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. 432 Mich, at 455-456.

Accordingly, a policy alone does not establish a basis for suit. In Rood v General Dynamics Corp., 444 Mich. 107; 507 N.W.2d 591 (1993), the Supreme Court stated that in the context of employer policy statements, "[t]he more indefinite the terms, the less likely it is that a promise has been made. And, if no promise is made, there is nothing to enforce." 444 Mich at 139. In Rood, the Court stated that only those policies and procedures which are reasonably related to employee termination are capable of instilling legitimate expectations. 444 Mich, at 138-139.

⁵ Plaintiff claims that at the time of hire an associate dean assured him that it was the policy of the University and the Ann Arbor City code not to discriminate on the basis of sexual preference. Hammer cannot base a "legitimate expectations" claim on such representations because (a) as stated in Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579, 598; 292 NW2d 880 (1980) and its progeny, this theory of recovery is based on employer-wide policy statements and (b) individual administrators of the University cannot as a matter of law bind the University with enforceable promises. See, An-Ti Chai v Michigan Technological University, 493 F Supp 1137, 1151-1152 (WD Mich 1980) (neither president nor vice president at state university had authority to bind university to any promise of tenure or terms of a contract not adopted by the Board of Control); Sittler v Board of Control, 333 Mich 681, 53 NW2d 681 (1952)(alleged employment contract based upon a letter from plaintiff's department chair was null and void and not binding on the Board of Control);

Accord, Bracco v Michigan Technological University, 231 Mich App 578, 599; 588 N.W.2d 467 (1998).⁶

The Michigan Supreme Court has repeatedly restricted the "legitimate expectations" leg of Toussaint to the "wrongful - discharge scenario." Dumas v Auto Club Insurance Association, 437 Mich 521, 531; 473 N.W.2d 652 (1991).⁷ In Dumas the Supreme Court expressly chose not to extend the "legitimate expectations" cause of action to disputes regarding an employer's compensation policy. Indeed, the Court stated that "policy considerations weigh in favor of containing Toussaint to the wrongful-discharge scenario." 437 Mich, at 531. Other courts have likewise declined to extend the legitimate expectations theory beyond the wrongful discharge context. See Fischlauer v General Motors Corp., 174 Mich App 450 (1988) (Toussaint does not apply to demotions or job assignments); Baragar v State Farm Ins. Co., 860 F Supp 1257 (W.D. Mich 1994).

The University of Michigan's policy of equal opportunity for individuals regardless of sexual orientation is not a discharge policy and not a contract. The Faculty Handbook, which Hammer received, specifically states that it does not constitute contractual obligations but instead represents a "commitment" by which the University intends to govern itself. As with other governance documents, such as the Standard Practice Guides and Regent By-laws, the University reserved to itself the right to interpret how policies are to apply. An individual aggrieved by an alleged violation of the nondiscrimination policy can complain to administrators identified in the very next sentence of the policy. The University's "commitment" to implement its equal employment opportunities policies through various formal and informal mechanisms of

⁶ The question whether employee expectations are legitimate is a question of law for the Court. Bullock v. Automobile Club of Michigan, 432 Mich. 472; 444 N.W.2d 114 (1989).

⁷ As early as Valentine v General American Credit, Inc., 420 Mich 256, 258; 362 N.W.2d 628 (1984), the Supreme Court stated that "The only right held in Toussaint to be enforceable was the right that rose out of the promise not to terminate except for cause."

internal governance does not rise to the level of a contractual undertaking enforceable in the courts nor does it constitute a promise capable of instilling a legitimate expectation.

No Michigan court has extended the legitimate expectations theory of recovery to generalized policies against discrimination. Plaintiff identified no such authority. The "legitimate expectations" theory of *Toussaint* should not be expanded in this case for several reasons. First, the Michigan Supreme Court has held in Mack v City of Detroit, 467 Mich 186; 649 NW2d 47 (2002) that a city charter purportedly creating a cause of action against the city for sexual orientation discrimination contravened and was preempted by state governmental immunity law. Consistent with the Court's holding in Mack, Hammer's venue for pursuing his sexual orientation discrimination claim is with University officials and not the courts. Similarly, the Michigan courts have declined to analyze the soundness of an employer's decision, or second-guess whether the decision was "wise, shrewd, prudent or competent." Hazle v Ford Motor Co, 464 Mich 456, 464 n 7; 628 NW2d 515 (2001). That admonition is particularly appropriate in discrimination cases involving university tenure decisions. Those courts that have been called upon to address such claims have acknowledged that courts are not to evaluate the scholarship and qualifications of tenure candidates or substitute their judgment for that of the academic institution. See, Dobbs-Weinstein v Vanderbilt University, 185 F3d 546 (CA 6, 1999) (recognizing that tenure decisions in an academic setting involve a combination of factors which set them apart from employment decisions generally); Weinstock v Columbia University, 224 F3d 33, 43 (CA 2 2000) (university had a "legitimate, nondiscriminatory reason" for denying female candidate tenure in spite of a positive 3-2 vote by the ad hoc committee where there was disagreement about the originality of plaintiff's work and the strength of external review letters); Tanik v Southern Methodist University, 116 F3d 775 (CA 5 1997); Jiminez v Mary Washington College, 57 F3d 369 (CA 4 1995); Frumkin v Board of Trustees, Kent State University, 626 F2d

19, 21-22 (CA 6 1980) ("universities have traditionally been afforded broad discretion in their administration of internal affairs").

The Court should not second-guess the conclusion reached by Law School faculty regarding the merits of Plaintiff's scholarship. Yet a trial of this case will ineluctably require an examination of just how the faculty evaluated Plaintiff's written scholarship. Courts have made it clear that a plaintiff must present clear and preponderant evidence to show that the rationale for denying a candidate tenure is a pretext for intentional unlawful discrimination. In response to Defendant's motion for summary disposition, Hammer presented no probative evidence, let alone clear and convincing evidence of discriminatory intent. Based on the policies alone, however, summary disposition was warranted as to Plaintiff's claim of reasonable or legitimate expectations.

2. **Plaintiff Failed To Adduce Probative Evidence Of Discriminatory Intent.**

Even if the University's nondiscrimination "commitment" were actionable, Hammer identified no evidence that any faculty member voted to deny him tenure because of his sexual preference. Plaintiff adduced no direct or indirect evidence that anyone's vote was motivated by Hammer's sexual orientation. Plaintiff was denied tenure because of the quality of his scholarship. There is no probative and admissible evidence of any other motivation.

In response to Defendant's motion, Hammer presented speculation and tangential facts which were neither probative nor permitted an inference of discriminatory bias. For example, in attacking Dean Lehman's motivation for voting against tenure, Hammer identifies nothing but an accusation in a student newspaper at Cornell University when Lehman was President at that school several years after Hammer was denied tenure. The hearsay from the student newspaper claimed that Lehman must be anti-gay because he allowed military recruiters on campus with

their "Don't ask, don't tell" policy against gays and lesbians. Under a provision of federal law known as the Solomon amendment, universities could lose federal funds if they banned military recruiters from their campuses. Indeed, Lehman opposed this provision of federal law (Lehman 98-99) even though the U.S. Supreme recently upheld the constitutionality of the provision in Rumsfeld v FAIR, 2006 WL 521237 (March 6, 2006). This is no evidence of bias on the part of Lehman who hired at least four openly gay faculty at Michigan.

Hammer claimed that Rich Friedman's vote was questionable because Friedman sent an email to professors at Ohio State after Hammer was denied tenure in which he tried to help Hammer find a job at that university (Friedman 39-40). There was nothing inconsistent between the statements in the email about Hammer's non-scholarly virtues and Friedman's opinion of whether Hammer's scholarship met Michigan's standards (and, of course, Hammer nowhere provides evidence to explain why Friedman would assist Hammer in finding employment if Friedman were truly biased against gays).

Similarly, Hammer cannot avoid summary disposition by way of assertion, accusation and speculation. Hammer's mere assertion that Sherman Clark, who is African American, is pro-life; that Bill Miller is Jewish and has written books with comments about how society (not Miller himself) views gays, African Americans and Jews; and that Kyle Logue may have taught Sunday school at a local Baptist Church is no evidence that these individuals harbored any anti-gay bias in general, let alone voted to deny him tenure in this specific case because of his sexual orientation. Homosexuality does not violate Logue's personal religious beliefs, and Hammer presented no admissible evidence to the contrary (Logue 21). Plaintiff also alleges that certain faculty members displayed discriminatory animus because they talked about their children or because they lived in the "family setting" Burns Park area of Ann Arbor (101, 244, 364). Generalized accusations that certain faculty held an anti-gay bias, without any specific evidence,

of such bias, does not create a genuine issue of fact for trial. Carmen v San Francisco Unified School District, 237 F3d 1026, 1028 (CA9, 2001) (plaintiff's belief that defendant acted from an unlawful motive is no more than speculation or unfounded accusation and does not constitute evidence to withstand summary judgment); O'Regan v Arbitration Forums, Inc., 246 F3d 975, 986-987 (CA7, 2001) (lower court did not abuse discretion in striking portions of affidavit of plaintiff's witness who speculated about the decision-maker's thoughts).

Among the faculty who voted against him, Hammer considered Logue and Caminker friends and had a cordial, professional relationship with Croley, Krier and Hills (277-278, 284). As to other faculty whom Hammer now accuses of anti-gay bias, he provided no specific evidence of such a bias that could create a genuine issue of fact for trial. Faculty who supported him for tenure consistently affirmed that Hammer's sexual preference was never a consideration in the evaluation of his case (Howse I, 14, 20; Reimann 14, 19-21; Green 37; Payton 13).

Even if the Court were to treat Plaintiff's submissions as evidence of pre-disposition, Hammer has failed to adduce any evidence that any faculty member *acted on* that predisposition in voting to deny him tenure. Absent evidence that the decision-makers acted on the alleged predisposition, summary disposition is required. Reisman v Board of Regents of Wayne State, 188 Mich App 526, 537; 470 NW2d 678 (1991) (To prove intentional discrimination, the plaintiff must show that the person who discharged him was predisposed to discriminate against persons in the affected class and actually acted on that disposition in discharging him.); Schultes v Naylor, 195 Mich App 640, 646; 491 NW2d 240 (1992); Singal v General Motors Corp., 179 Mich App 497, 447 NW2d 152 (1989). Hammer has no evidence of intentional discrimination in the faculty vote.

Hammer also claims that four years before his 2002 tenure review he heard a comment in the faculty lounge of the nature that one had to be homosexual or a Jew to be hired in the Law

School and that "there was just too many gay and Israeli people" on the faculty (247, 250). Plaintiff does not know who made the alleged remark, nor did he complain to anyone in the University about it (251).⁸ There was no evidence that the declarant voted on Hammer's tenure application or that this view was shared or considered by anyone who did vote. It is a nonprobative stray remark with no causal connection to Hammer's tenure review. Krohn v Sedgwick James of Michigan, Inc., 244 Mich App 289, 295; 624 NW2d 212 (2001) (finding no abuse of discretion in trial court's exclusion of "out with the old and in with the new" comment in age discrimination case, holding comment ambiguous and age-neutral).

What is undisputed is that the Dean and faculty who reviewed Hammer for tenure hired Jane Schacter and Jim Hathaway with tenure. Professor Brodie was given a clinical appointment. Other gay members of the faculty who had been awarded tenure were Bruce Frier, David Chambers, Jim Martin and, according to Hammer, Whitmore Gray (266). Moreover, Hathaway, Schacter and Brodie have all attested to the receptive and supportive environment they encountered at Michigan (Hathaway 9-10, 23-25; Schacter Aff ¶ 5, 10; Brodie Aff ¶ 7). Professors Schacter and Brodie were hired as a couple, and the Law School provided immigration assistance to Professor Hathaway's partner. Schacter, Brodie and Hathaway expressly contradicted Hammer's unsupported allegation that the Law School is anti-gay (Hathaway 20-25; Schacter Aff ¶ 5, 7, 10-11; Brodie Aff ¶ 5-7, 10-12).

3. **Plaintiff's Affidavit Filed In Opposition to Defendant's Motion For Summary Disposition Contained Inadmissible Hearsay and Conclusory Statements Lacking Foundation and Should Have Been Stricken Or Disregarded.**

In response to Defendant's motion for summary disposition, Hammer filed an affidavit replete with hearsay, unsupported vague and conclusory statements, and statements which

⁸ Hammer claims that this remark was made right after the Law School hired Jim Hathaway, Jane Schacter and Juliet Brodie, all of whom are openly homosexual, in 1998.

contradicted his deposition. The affidavit failed to comply with the requirements of MCR 2.116 (G)(6) and 2.119(B) and should have been stricken or disregarded. An affidavit that does not conform to the requirements of MCR 2.119(B) is fatally defective and cannot be relied upon to oppose a properly supported motion for summary disposition. See, e.g., Billings v Levitt, 10 Mich App 399, 402, 159 NW2d 376 (1968) (no affirmative showing of personal knowledge or that affiant could testify competently). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." SSC Associates Ltd Partnership v General Retirement System of the City of Detroit, 192 Mich App 360, 364, 480 NW2d 275 (1991), citing Remes v Duby (After Remand), 87 Mich App 534, 537, 274 NW2d 64 (1978).

Hammer's affidavit contains allegations which are unsupported by facts or personal knowledge. See e.g., PI's Aff. ¶ 17-19 (Plaintiff was not even employed at the Law School, did not participate in the tenure reviews of other faculty, and has no personal knowledge of the sexual orientation of every person who was considered for tenure); PI's Aff ¶ 21 (Regardless of how Hammer may have learned of the alleged history of discrimination, it is not based on his personal knowledge); PI's Aff ¶ 22 (Hammer has no personal knowledge of the allegations that he makes relative to Mr. Martin, who died long before Hammer was ever employed); PI's Aff ¶ 23-24, 53 (Plaintiff was not employed by the University at the time and has no personal knowledge of the facts as they relate to Mr. Chambers and the selection of a new dean); *see also* unsupported allegations in ¶¶ 49-51; 60-61. Hammer's allegations for which he has no personal knowledge should be stricken

Paragraphs 8, 9, 29, and 34 of the affidavit are hearsay. All of these statements are inadmissible and cannot be relied upon to oppose summary disposition and should be stricken. MCR 2.119(B).

Paragraph 9 of the affidavit directly contradicts Hammer's prior deposition testimony in which he stated that there was no offer of employment to his partner at either Georgetown or UCLA prior to Hammer's acceptance of the position at Michigan (thereby undermining his detrimental reliance claim). A party cannot create a genuine issue of material fact by submitting an affidavit which contradicts prior deposition testimony. See Dykes v William Beaumont Hosp., 246 Mich App 471, 480, 633 NW2d 440 (2001).

Hammer's affidavit is also full of vague, conclusory statements that lack any foundation or factual support. Plaintiff cannot create a genuine issue of material fact by asserting conclusory allegations without factual support. Rose v The National Auction Group, Inc., 466 Mich 453, 470, 646 NW2d 455 (2002), citing Quinto v Cross and Peters Company, 451 Mich 358, 370-72, 547 NW2d 314 (1996) (holding that an affidavit that provided "mere conclusory allegations and was devoid of detail" was insufficient to avoid summary disposition under MCR 2.116(C)(10)). See e.g., PI's Aff. ¶ 16 (Plaintiff alleges that "the promises of openness and non-discrimination were hollow and empty"); PI's Aff. ¶ 32 (Plaintiff asserts that no one would voluntarily leave the University of Michigan to go to the University of Wisconsin); and PI's Aff. ¶ 47 (Plaintiff asserts that Hathaway does not recognize the reality that he is being discriminated against). In paragraphs 42, 46 and 47, Hammer makes multiple unsupported assertions about Professor Hathaway, including conjecture that Hathaway "carefully fashioned his life so he is able to ignore and deny" discrimination against him based on his sexual orientation. Plaintiff's vague, conclusory statements that lack any foundation or factual support should have been stricken or disregarded.

B. Summary Disposition Is Warranted As To Plaintiff's Claim of Detrimental Reliance.

In Count II of this Complaint, Hammer alleges that in reliance on Defendant's commitment of nondiscrimination on the basis of sexual orientation, he "forbore from obtaining other favorable employment at major institutions across the country" and lost the opportunity to obtain tenure at one of these institutions. Hammer's deposition testimony flatly contradicts this speculation. Hammer testified that while his choices in 1995 were Columbia, Georgetown, U.C.L.A. and Michigan, he did not want to live in New York City and decided to accept Michigan's offer before determining whether his partner would be offered employment at the remaining two schools (19-21). Even if Hammer gave up other opportunities, this does not support a promissory estoppel claim in Michigan:

Promissory estoppel arises in equity when (1) there is a promise (2) that the promisor should have reasonably expected to induce action of a definite and substantial character on the part of the promisee (3) which in fact produces reliance or forbearance of that nature (4) under circumstances such that the promise must be enforced if injustice is to be avoided. *Martin, supra* 193 Mich.App. at 178, 483 N.W.2d 656. The doctrine of promissory estoppel is cautiously applied. *Marrero v. McDonnell Douglas Capital Corp.*, 220 Mich.App. 438, 505 N.W.2d 275 (1993). In order to support a claim of estoppel, a promise must be definite and clear. *Kamalnath v. Mercy Hosp Corp.*, 194 Mich.App. 543, 552, 487 N.W.2d 499 (1992).

Barber v SMH (US), Inc., 202 Mich App 366, 375-376; 509 NW2d 791 (1994) (conclusory allegation that plaintiff gave up other sales opportunities in reliance on defendant's promise of employment as long as he was profitable and doing his job does not raise a question of fact on the issue of promissory estoppel).

The doctrine "should be applied only when the facts are unquestionable and the wrong to be prevented undoubted." Derderian v Genesys Health Care Systems, 236 Mich App 364, 689 NW2d 145 (2004). Hammer's reliance is belied by his testimony and does not meet these rigorous tests. Summary disposition should have been granted on the detrimental reliance claim.

C. Summary Disposition Should Be Entered As To Plaintiff's Claim of Breach of Contract.

1. Despite Plaintiff's Contradictory Positions, The Undisputed Facts Warrant Dismissal of His Breach of Contract Claim.

In Count III, Hammer claims that he did not receive notice of non-reappointment nine months prior to his date of termination as required by Standard Practice Guide 201.88 and that because he was employed for eight years without such notice, he was entitled to a just cause termination hearing under By-Law 5.09 before his employment ended (Complaint ¶¶ 50-55). Indeed, Hammer attached to his Complaint Standard Practice Guides 201.88 and 201.13. In response to Defendant's motion, however, Hammer attempted to revamp his breach of contract claim by disavowing the SPGs and instead stating that "[a] fair reading of Plaintiff's claim however is that he relied on the By-Laws of the Board of Regents of the University of Michigan. By-Laws are not the same as the Standard Practice Guide nor do they have the same purpose" (Plaintiff's Brief in Opposition, p 26). In fact, the Standard Practice Guides expressly give content to By-law 5.09, as explained *infra*. But whether reliance is based solely on Bylaw 5.09 or also on the SPGs, the undisputed facts show that Hammer's contract claim must be dismissed.

Standing alone, By-law 5.09 contains no requirement that a notice of non-reappointment be issued to the faculty member. If, as Hammer claims in response to Defendant's motion, he is relying exclusively on the By-law for his contract claim and not SPG 201.88, then whether he received adequate notice of non-reappointment would be immaterial.

Moreover, By-law 5.09 requires only that for any full-time faculty who have completed a total of eight years of "service" but have not received notice of non-reappointment, the University cannot terminate their employment without a hearing to determine just cause. Hammer, of course, left the University of Michigan to begin employment at Wayne State before there was any need for the University to request or initiate a termination hearing under By-law

5.09. As Hammer had expressly requested, he used the "extra" terminal year he had previously negotiated with Dean Lehman to secure a full-time, tenure track position at Wayne State. Hammer left the employment of the University to pursue that alternative employment. A just cause hearing pursuant to By-law 5.09 would only be needed if Hammer's employment with the University continued past eight years and was then terminated by the University. Hammer was already gone by the time such a hearing would have been necessary. Hammer's apparently new reliance on the By-law alone warrants summary disposition.⁹

Even if both the By-law and the SPGs are considered, there is no genuine issue of material fact that (1) the Faculty Handbook states that the provisions of both the SPGs and the By-laws can be changed or terminated at any time and that neither the SPGs nor the By-laws establish or imply contractual obligation to any individual faculty member (Ex. B); (2) Hammer had actual notice, sufficient to satisfy SPG 201.88, both written and oral, that he had been denied tenure and that his appointment would not extend beyond the 2002-2003 academic year; (3) Hammer is estopped by his own conduct from disclaiming notice of nonreappointment; (4) Hammer did not accrue eight years of service under SPG 201.13 because for two semesters he was relieved of all teaching and other duties so that the leaves did not qualify as service time for purposes of By-law 5.09; and (5) even if Hammer was on the verge of acquiring entitlement to the protections of By-law 5.09, Hammer left the University to take employment elsewhere; and, therefore, there was never a need for a termination hearing under Regent By-Law 5.09.

⁹ In response to Defendant's motion, Hammer tried to base his contract claim solely on By-law 5.09 because SPG 201.88 and 201.13 defeat rather than support his contract claim. But even Hammer's Brief in Opposition concedes that the determination of whether By-law 5.09 applies to him depends on whether all of his employment counts as service time and whether he received adequate notice of non-reappointment (SPGs 201.13 and 201.88 respectively) (Plaintiff's Brief in Opposition, p. 27). Hammer's contract claim based on By-law 5.09 alone fails because the By-law contains no requirement of a notice of non-reappointment and the hearing provision is triggered only if the faculty member's employment extends into the ninth year.

The University's Standard Practice Guides Do Not Constitute A Contract Of Employment.

Hammer claims that because he was employed by the University for eight years, he was entitled to the procedural protections of Regent By-Law 5.09, which apply to dismissal of tenured faculty (Ex. O, P). Hammer's breach of contract claim fails because the Faculty Handbook which he received explicitly disclaims that the Standard Practice Guides and the By-laws constitute a contract (Ex. B). Hammer had notice that the SPGs and the By-laws were guides. He admits, as he must, at page 20 of his response to Defendant's motion that the University retained the right to modify the SPGs and the By-laws. Accordingly, Hammer has no breach of contract claim based on Regent By-law 5.09. See, Stewart v Fairlane Community Mental Health Centre, 225 Mich App 410, 420; 571 NW2d 542 (1997) (agreement to arbitrate is not mutual and not binding where employer could unilaterally amend at any time the policies contained in the employee manual, relying on Heurtebise v Reliable Business Computers, Inc., 452 Mich 405; 550 NW2d 243 (1996)). Moreover, there is no mutuality to support a contract theory of recovery because Hammer was free to leave the University at any time, in fact accepted an offer of employment with Wayne State University by January 2, 2003, and executed a written contract of employment with Wayne State on March 13, 2003. Plaintiff cannot establish an express or implied contract based on the Standard Practice Guides or the By-laws.

The Faculty Handbook also expressly reserved to the University the authority to interpret the By-law and SPGs upon which Hammer relies. Defendant therefore had the right to determine that Hammer did not qualify for a termination hearing at the time he requested it in January, 2003. Thomas v John Deere Corp, 205 Mich App 91, 95 (1994) (an employer may negate an employee's ability to seek judicial review of its decision to terminate by placing a

provision in the employment contract reserving unto itself the sole authority to decide whether termination is justified).

3. **There Is No Genuine Issue For Trial That Plaintiff Received Notice Of Non-Reappointment Prior To His Last Year Of Employment At The University.**

SPG 201.88 states that for individuals who are in tenure-track positions "it is the intent of the University to notify individuals who are not to be reappointed ...no later than a date which would provide nine (9) months advance notice of the termination date." (Ex. O). It is undisputed that under the policies of the Law School, tenure track faculty can expect to receive only one tenure review. Hammer received the highly favorable treatment of two tenure reviews and was promptly notified both in February, 2000, and again in February, 2002, that he had not been granted tenure. It is likewise undisputed that after the 2000 review, the Law School Dean notified Hammer in writing that the 2001-2002 academic year would be his terminal year of employment were his second tenure review unsuccessful. In response to this letter, Hammer explicitly requested the Dean to extend the terminal appointment by one year so that Hammer would have the "safety net" of added time to find another job if he was denied tenure (Ex. E). Hammer requested one and only one year. Hammer's request for the added year evidences notice of non-reappointment.

After Dean Lehman agreed to Hammer's request, Hammer received nothing orally or in writing which in any way altered or negated the notice of non-reappointment he received before his terminal year. Consistent with his request for the "safety net" of a final year in 2002-2003, Hammer looked for and secured other employment. Having affirmatively represented that the additional one-year appointment was a "safety net" to find other employment, Hammer cannot claim lack of notice of non-reappointment. Indeed, even Hammer's affidavit filed in opposition

to Defendant's motion nowhere disclaims the notice of non-reappointment he undeniably received from Dean Lehman.

Dean Lehman's February 28, 2000 letter notifying Hammer that 2001-2002 would be his terminal year if denied tenure satisfied SPG 201.88 for non-reappointment (Frumkin 26-27, 42-44, 48-49; Courant 82-83, 87, 92-93). Then-Provost Paul Courant reached the same conclusion (Courant 82, 84, 93). In response to Defendant's motion, Hammer concedes that Jeff Frumkin, the Assistant Provost and Senior Director of Academic Human Services, found that Dean Lehman's February 28, 2000 letter to Hammer satisfied the notice provisions of SPG 201.88 (Plaintiff's Brief in Opposition, pp. 29-30). It was undisputed from University officials Courant and Frumkin and Hammer's July 21, 2000 request to Dean Lehman that Hammer had notice of non-reappointment *before* his terminal year, whether the terminal year was 2001-2002 or 2002-2003.

Hammer tries to confuse the issue and argue that Dean Lehman's 2000 letter providing notice must be considered insufficient because otherwise there was no reason for Associate Dean Evan Caminker to have a conversation in the spring of 2002 with Frumkin in which Frumkin advised Caminker to provide notice of non-reappointment to Hammer before September 15 of his final year. But there is no evidence that at the time of their conversation either Frumkin or Caminker was even aware of the previous communications between Dean Lehman and Hammer regarding Hammer's terminal year. It is undisputed that the non-reappointment notice came from Dean Lehman. Any conversation between Frumkin and Caminker is simply immaterial; moreover, no further notice to Hammer was needed once Frumkin and Caminker became aware of the previous written exchange between the Dean and Plaintiff (Frumkin 26-29, 42-43, 48-49).

Plaintiff also received an appointment notice reflecting a two-year appointment through May 31, 2002; his last appointment notice dated August 30, 2002, was for one year consistent

with his July 21, 2000 email to Dean Lehman (Ex. G). These notices are clear and unequivocal. Hammer also received a letter from Dean Lehman dated September 5, 2002, stating: "As you explore possible opportunities for next academic year, Peter, I hope you will let me know how I can best help." (Ex. Q). These additional notices confirm that Hammer had no legitimate expectation, contractual or otherwise, for employment beyond 2002-2003.

Plaintiff's conduct further demonstrates that he had actual notice of non-reappointment and understood that 2002-2003 was his final year. He told his secretary that he had been "fired" after learning of the tenure vote in 2002. Hammer received an offer from the University of Toledo at the beginning of the fall 2002 semester (132). He negotiated offers from the University of Maryland and from Wayne State University by early December, 2002 (122). On January 2, 2003, he accepted the Wayne State offer (Ex. J). Within a few days, Hammer wrote to all faculty at Michigan's Law School telling them that "this is my final semester" (Ex. L). He did not select classes for the 2003-2004 term at Michigan. Instead, he signed a contract of employment with Wayne State on March 13, 2003. Hammer acted in accord with his July 21, 2000 email to Jeff Lehman that 2002-2003 would be his final year if not granted tenure.

Hammer's successful job search and his own documents preclude a claim that he was not notified that 2002-2003 was his final year. See, Healy v Fairleigh Dickinson University, 287 NJ Super 407 (1996) (rejecting claim of *de facto* tenure even though faculty member was reappointed for a term extending beyond the probationary period). No genuine issue of fact remains for trial that Plaintiff had adequate notice that the 2002-2003 academic year would be his terminal year. Dean Lehman's February 28, 2000 letter contained all of the elements of notice which SPG 201.88 contemplates (Frumkin 48-49; Courant 82-82).¹⁰

¹⁰ Hammer argues that Lehman's February 28, 2000 letter was "conditional" and therefore not compliant with SPG 201.88 because notice applied only if Hammer were denied

Notice to Hammer was therefore grounded not only in Dean Lehman's February 28, 2000 letter but also in Hammer's July 21, 2000 request. By requesting an additional terminal year beyond that stated in Dean Lehman's letter, Hammer clearly evidenced an understanding that a denial of tenure in 2002 would trigger a need for him to find alternative employment. Hammer thus confirmed that he had adequate notice of non-reappointment more than nine months before his termination to satisfy SPG 201.88. The fact that Hammer was afforded a second tenure review and negotiated with Dean Lehman a terminal year ending in 2003 does not vitiate the validity of the clear notice provided by Dean Lehman's 2000 letter and Hammer's July 21, 2000 response. Hammer's response to Defendant's motion presents no evidence to the contrary.¹¹

4. **Plaintiff Is Estopped From Asserting A Breach of Contract Claim.**

After successfully requesting an additional year of employment to allow him time to find a new job if he was denied tenure in 2002, Hammer now uses that fact to claim that he thereby acquired rights to a just-cause termination hearing. The principles of equitable estoppel, however, bar Hammer from asserting this claim.

Equitable estoppel arises where (1) a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on that belief; and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. See Conagra, Inc v Farmers State Bank, 237 Mich App 109,

tenure a second time. The practice guide states that the notice of non-reappointment "should" not be conditional; the guide does not say that the notice "must" be unconditional or else the notice of non-reappointment is defective. Moreover, the only "condition" contained in Lehman's letter is the second denial of tenure itself, which is not the kind of condition that undermines or qualifies the notice of non-reappointment. The denial of tenure and the non-reappointment go hand and hand, which is precisely why Hammer requested that the terminal year be one year later.

¹¹ Indeed, even Hammer's 20-page, self-serving affidavit filed in opposition to Defendant's motion nowhere disputes the sufficiency of the notice of non-reappointment.

141; 602 NW2d 390 (1999); Lakeside Oakland Development, LC v H&J Beef Co, 249 Mich App 517; 644 NW2d 765 (2002).

When Hammer received written notice in 2000 that the 2001-2002 academic year would be his terminal year, he asked for and represented to the University that an additional year through 2002-2003 would give him time to transition to new employment if he did not receive tenure in 2002. Plaintiff admits requesting the additional year to allow time to find another job (209). Relying upon Plaintiff's representations, the University of Michigan Law School granted his request. Hammer then used the added one-year appointment to locate and accept employment elsewhere with Wayne State. He is equitably estopped from now claiming that the extra year of employment allowed him to obtain the same hearings rights as tenured faculty. See Penny v ABA Pharmaceutical Co, 203 Mich App 178; 511 NW2d 896 (1994) (reversing dismissal of plaintiff's claims for failure to serve a defendant where that defendant's attorney was aware of the pendency of the lawsuit and had attended hearings in the litigation). Finding otherwise would cause an inequity by permitting Plaintiff to deny his undisputed representation while causing great prejudice to Defendant, which understandably and reasonably believed that 2002-2003 had unequivocally been designated as Hammer's terminal year and that no further notice of non-reappointment was necessary.

5. **Plaintiff Did Not Accrue Eight Years Of Service To Acquire Hearing Rights Under By-law 5.09.**

Hammer does not dispute that he took semester-long research leaves in the falls of 1998 and 2000 and was relieved of all teaching, administrative and service obligations during these leaves (Lehman 9-10). Whether these research leaves count as "service" for purposes of accruing eight years of service under By-law 5.09 is determined by SPG 201.13, which states that the service "must be spent" in one of four defined categories to qualify for "service" time for

By-law 5.09. In response to Defendant's motion Hammer identified no evidence establishing that either the 1998 or 2000 leave of absence qualified as service time under SPG 201.13.

The first category of "service" time in SPG 201.13 is "a) in residence at the University of Michigan." Being "in residence" is not a leave of absence at all. It is undisputed that Hammer did not teach classes during the two research leaves and was not required to perform any other job duties. In response to Defendant's motion, Hammer asserted, without any evidentiary support, that he must be considered to have been "in residence" because even though he performed no duties, he did not physically leave Ann Arbor during those two semesters. In response to Defendant's motion, Hammer presented no evidence whatsoever to show that he was "in residence" at the University during the 1998 or 2000 leaves and does not dispute that he was not required to perform employment responsibilities during those two leaves.¹²

The second category is "b) on paid duty off campus." Hammer makes no claim, and provides no evidence to show, that he was performing any paid duties off campus during the 1998 and 2000 semester leaves.

The third category is "on Sabbatical Leave (SPG 201.30-2) or Scholarly Activity Leave (SPG 201.30-4)." It is undisputed that Hammer took a sabbatical leave in the fall of 2001, and he makes no claim that the leaves in 1998 and 2000 constituted a sabbatical (Lehman 9). It is likewise undisputed that neither the 1998 nor the 2000 leave qualified as a "Scholarly Activity Leave." SPG 201.30-4 states that such leaves are limited to allowing a faculty member to accept a "prestigious fellowship" or perform a "temporary appointment at another institution." [Ex. P; Ex. 3 to Defendant's Reply Brief]. Hammer did neither (314; Lehman 10). Not surprisingly,

¹² If Hammer's claim is that "in residence" means simply receiving pay without any required duties, then it would be completely superfluous for SPG 201.13 to continue to enumerate other categories of paid leave which can qualify as "service" for By-law 5.09.

there is no evidence that Hammer ever even applied for a Scholarly Activity Leave for either semester.

The fourth catch-all leave category listed in SPG 201.13, Subsection II.A.3 provides that “d) Time spent on other scholarly leaves *may* be counted *provided* the individual and the unit so agree in writing at the time the leave is granted and such agreement is approved in writing by the Office of the Provost and Executive Vice President of Academic Affairs” (emphasis supplied). It is undisputed that there was never any written agreement between the Law School and Hammer stating that either of these leaves would count toward By-law 5.09 “service” time (Lehman 10-13). There was likewise never any written approval from the Provost for such leave to count as “service” time as required by SPG 201.13 (Lehman 10-13).

Hammer simply argues that such an agreement *should* have been put in writing and that the Law School cannot fairly rely on the absence of the required agreement to defeat Hammer’s contract claim. But SPG 201.13 makes clear that the scholarly leave which Hammer took in the falls of 1998 and 2000 to endeavor to improve his tenure file does not count toward By-law 5.09 service time unless accompanied by express written agreements from both the Law School and the Provost. Absent such written approvals, the SPG provides that the time does not count. There was no written permission for Hammer’s leaves to count because the leaves were *never intended* to count as service (Lehman 12). The Law School was willing to give Hammer a second tenure review and time off work to concentrate on preparing his scholarly portfolio – but not to accumulate service time for purposes of By-law 5.09’s hearing procedures. Hammer presents no evidence to show otherwise.

It is true that Dean Lehman approved both the 1998 and 2000 leaves, as Hammer claims, in order to afford Hammer (extra) time in which to produce tenure-worthy scholarship. But approval for Hammer to take the leaves and approval for the leaves to count as service time are

two very different things. There is no factual dispute that these leaves do not satisfy SPG 201.13, Subsection II.A.3 and do not qualify for By-law 5.09 service time. Accordingly, there is no genuine issue of fact that Hammer did not accrue eight years of "service" time so as to secure the protections of By-law 5.09.

6. **Hammer Never Worked Beyond Eight Years To Trigger Regent By-Law 5.09 Which Govern Dismissals Of Tenured Faculty.**

Hammer left the University at the end of eight years to take other employment. Regent By-Law 5.09 requires a hearing before the termination of a full-time faculty member who has completed eight years of service and whose employment continues because there was no notice of non-reappointment (Frumkin 23). Hammer claims that his attorney requested a hearing under By-law 5.09 by letter dated January 14, 2003, shortly after Hammer accepted a faculty position at Wayne State and at the same time Hammer wrote to the Michigan Law School faculty stating that this was his last semester at Michigan. Even if Hammer had not received sufficient notice and his leaves of absence counted as service time for purposes of By-law 5.09, Hammer still had not completed a total of eight years of service at the time he requested the hearing. Hammer's hearing rights never ripened even under his theory of the case.

Hammer signed an employment contract with Wayne State on March 13, 2003, and his appointment with Defendant ended on May 31, 2003. Hammer was not eligible for a termination hearing in January, 2003, nor did he remain employed at Michigan beyond eight years because he left to pursue other employment. Because Hammer was not engaged in a full-time capacity beyond eight years, there was clearly no need for the University to initiate any termination proceedings against Hammer under the By-law. Hammer therefore had left Defendant before any alleged contract could be breached. The fact that minutes of Defendant's Board of Trustees' July, 2003 meeting reflect that Hammer resigned at the end of his appointment on May 31, 2003,

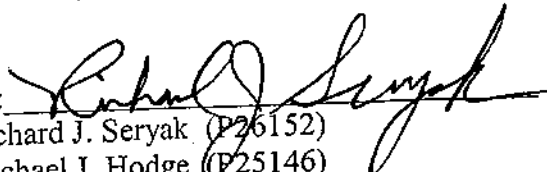
is not only accurate but consistent with Hammer's finding employment elsewhere, his not selecting classes to teach at Michigan in 2003-2004, his statements to colleagues about his future plans.

CONCLUSION AND REQUESTED RELIEF

On the basis of all of the foregoing considerations, and the attached exhibits, deposition testimony, and affidavits filed herewith, Defendant respectfully requests that this Honorable Court reverse its earlier rulings and grant Defendant's Motion for Summary Disposition and Defendant's Motion to Strike Plaintiff's Affidavit filed in response to the motion in their entirety.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: 
Richard J. Seryak (P26152)
Michael J. Hodge (P25146)
Attorneys for Defendant
150 W. Jefferson Avenue, Ste. 2500
Detroit, MI 48226
(313) 963-6420

Dated: May 17, 2006

LIST OF EXHIBITS

LIST OF EXHIBITS

EXHIBIT	DESCRIPTION	PLACE IN RECORD
A	Letter dated February 10, 1995, from Jeffrey Lehman to Peter Hammer	Attached to Defendant's Motion for Summary Disposition, 2/17/06
B	Faculty Handbook, excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
C	Tenure Standards and Procedures	Attached to Defendant's Motion for Summary Disposition, 2/17/06
D	Letter dated February 28, 2000, from Jeff Lehman to Peter Hammer	Attached to Defendant's Motion for Summary Disposition, 2/17/06
E	7/21/00, email from Peter Hammer to Jeff Lehman	Attached to Defendant's Motion for Summary Disposition, 2/17/06
F	8/14/00, email from Jeff Lehman to Peter Hammer, in response to Peter Hammer's 7/21/00 email	Attached to Defendant's Motion for Summary Disposition, 2/17/06
G	Appointment Change Request dated 5/18/00	Attached to Defendant's Motion for Summary Disposition, 2/17/06
H	10/29/01, email from Peter Hammer to Rob Howse	Attached to Defendant's Motion for Summary Disposition, 2/17/06
I	10/20/01, email from Peter Hammer to Rob Howse	Attached to Defendant's Motion for Summary Disposition, 2/17/06
J	1/2/03, email from Peter Hammer to Dean of the University of Toledo and to Dean of the University of Maryland	Attached to Defendant's Motion for Summary Disposition, 2/17/06
K	12/29/02, email from Peter Hammer to the Dean of Wayne State University	Attached to Defendant's Motion for Summary Disposition, 2/17/06
L	1/17/03, Letter from Peter Hammer to the Michigan Law School faculty	Attached to Defendant's Motion for Summary Disposition, 2/17/06
M	March 13, 2003, written employment agreement with Wayne State University signed by Peter Hammer	Attached to Defendant's Motion for Summary Disposition, 2/17/06
N	11/25/02, Memorandum from Peter Hammer regarding Appeal of Grievance Review Board's Decision	Attached to Defendant's Motion for Summary Disposition, 2/17/06
O	Standard Practice Guide 201.88	Attached to Defendant's Motion for Summary Disposition, 2/17/06

EXHIBIT	DESCRIPTION	PLACE IN RECORD
P	Standard Practice Guide 201.13	Attached to Defendant's Motion for Summary Disposition, 2/17/06
Q	9/5/02, Letter from Dean Lehman to Peter Hammer	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Plaintiff's deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Omri Ben-Shahar deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Evan Caminker deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Sherman Clark deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Paul Courant deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Steven Croley deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Richard D. Friedman deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Bruce Frier deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Jeffery Frumkin deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Thomas Green deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	James Hathaway deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Don Herzog deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Robert Howse deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Thomas Kauper deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Jeffrey Lehman deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Kyle Logue deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06

EXHIBIT	DESCRIPTION	PLACE IN RECORD
	William Miller deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Sallyanne Payton deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Matthias Reiman deposition excerpts	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Affidavit of Juliet Brodie	Attached to Defendant's Motion for Summary Disposition, 2/17/06
	Affidavit of Jane Schacter	Attached to Defendant's Motion for Summary Disposition, 2/17/06

DELIB:2726641.2\060548-00354
DRAFT 05/10/06 12:40 PM