

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER,
Plaintiff,

vs.

CASE NO. 04-241-MK
HON. JAMES R. GIDDINGS

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

DEPOSITION OF:

OMRI BEN-SHAHAR
October 31, 2005
900 Victors Way
Ann Arbor, Michigan

Appearances - PHILIP GREEN, P-14316
Attorney for Plaintiff

RICHARD J. SERYAK, P-26152
Attorney for Defendant

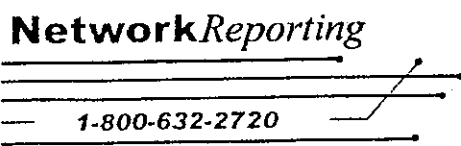
Also Present - Evan Caminker

Recorded By - NETWORK REPORTING CORPORATION
Diane H. Draugelis, CER-2530

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1 A I had discussions with people on what their views were,
 2 favorable or less favorable, before the vote.
 3 Q With whom did you have those discussions?
 4 A Well, I don't remember the entire list. I remember that I
 5 had a discussion with Sam Gross. I think I had a
 6 discussion with Merritt Fox, although I'm not sure. I
 7 think I may have had a discussion with Ronald Mann, but
 8 I'm not sure again whether the -- the way he was going to
 9 vote to come up -- came up. And I think there were a few
 10 more people, but I can't remember exactly who.
 11 Q Do you remember what Sam Gross had said about his views of
 12 Peter Hammer's tenure application?
 13 A Yes.
 14 Q What did he say?
 15 A He said that he thinks we should vote "yes"; that I should
 16 vote "yes," too.
 17 Q Why did you seek out Sam Gross's opinion?
 18 A Actually he sought out my opinion, so he came to my
 19 temporary office that week and we had a conversation.
 20 Q Your temporary office here in the United States as opposed
 21 to back in Israel?
 22 A During that year when I was away, my permanent office here
 23 was occupied by a visitor, so I was sitting in a temporary
 24 office.
 25 Q So that would have been here in Ann Arbor then?

1 Q So would it be fair to say that what was said during the
 2 discussion phase of the second meeting was that which
 3 tipped the balance against tenure in your mind?
 4 MR. SERYAK: I'm going to object. I don't think that
 5 fairly states it.
 6 MR. GREEN: I'm asking him that. It's a question.
 7 Don't coach him.
 8 MR. SERYAK: You asked him when. I'm not coaching
 9 him, but I mean, that doesn't accurately state what he
 10 said earlier.
 11 MR. GREEN: Well, I think what he said was -- and we
 12 can listen to it -- that it was at some point during the
 13 second meeting that he decided to vote against tenure.
 14 And I'm asking him --
 15 Q -- whether or not it was during the discussion phase of
 16 the second meeting that something tipped the balance in
 17 favor of your voting against tenure.
 18 A I am having a hard time responding to that because I do
 19 not recall an event that tipped. I was, in my mind,
 20 trying to balance many different things that I heard, and
 21 I do not remember any moment in time in which I cranked
 22 out an output and it came out "no." I was conflicted,
 23 confused, and searching -- searching the right thing to
 24 do. And I was -- eventually decided, so I confessed to
 25 vote "no."

1 A At the law school.
 2 Q He sought your advice?
 3 A He sought a conversation, and I sought, too. I was very
 4 happy that he did.
 5 Q You nonetheless voted against tenure I take it?
 6 A Yes.
 7 Q So whatever reasons Sam Gross had given to you you found
 8 unpersuasive I take it?
 9 A No, I found incredibly persuasive, and I was unsure about
 10 how my vote would go.
 11 Q At what point then did you make up your mind which way to
 12 vote?
 13 MR. SERYAK: I just want to make sure you finished
 14 your answer.
 15 MR. GREEN: I thought he had.
 16 MR. SERYAK: And he may have.
 17 Q Had you finished your answer?
 18 A I guess so.
 19 Q If you hadn't, please feel free.
 20 A I forgot what the answer -- what the question was. It's
 21 okay. I finished my answer.
 22 Q At what point did you make up your mind which way you were
 23 going to vote?
 24 A At some point along the discussion, towards the end of the
 25 second meeting.

1 Q Let me see if I can at least narrow this down to when this
 2 decision was made and what input there was into it. Would
 3 it be fair to say that when you walked into the meeting at
 4 which the vote was taken, before any discussion began,
 5 that you were conflicted about which way you were going to
 6 vote?
 7 A Yes.
 8 Q Would it be fair to say in light of the fact that you were
 9 conflicted that whatever the writings were that you had
 10 reviewed had not persuaded you to vote against tenure?
 11 A They have persuaded me that a case for tenure cannot be
 12 made on the basis of scholarship. And they persuaded --
 13 but I guess that's -- that's how I put it.
 14 Q Even before this meeting began, you felt that there was
 15 insufficient scholarship for tenure?
 16 A Yes.
 17 Q Then why was it that you were still conflicted before the
 18 meeting began about which way you were going to vote?
 19 A Because I recognize that some of my colleagues that have
 20 more experience than I do believed that other factors have
 21 to be weighed -- have to be weighed as well, in a way
 22 that, in their mind, overrides the judgment that one may
 23 have about scholarship.
 24 Q Did you hear discussion to that effect during the
 25 discussion phase of the second meeting?

1 A Yes.
 2 Q Do you remember who made statements to that effect?
 3 A Almost every person that spoke. Almost every person that
 4 spoke made reference to the question how much should
 5 scholarship be weighed vis-a-vis other issues.
 6 Q What did Merritt Fox tell you in your discussion with him
 7 about how he might vote?
 8 A I don't remember.
 9 Q How about Ronald Mann?
 10 A I also don't remember.
 11 Q Well, I'm curious now. You've indicated that you didn't
 12 feel that the scholarship was of a sufficiently high
 13 standard to meet the tenure requirements when you went
 14 into the meeting?
 15 A Uh-huh (affirmative).
 16 MR. SERYAK: Wait a minute. Is that a "yes"?
 17 Q That's a "yes"?
 18 A Yes. Sorry.
 19 Q And during the course of the meeting, without regard to
 20 what was said, you came to the conclusion that the
 21 appropriate thing for you to do was to vote against
 22 tenure; correct?
 23 A Yes.
 24 Q Before you came to that conclusion, you heard your
 25 colleagues saying things about how even if the scholarship

1 I have seen before write, so I naturally relied on them
 2 more.
 3 Q Did you have any knowledge of whether Professor Elhauge
 4 had expressed any type of reservations about the scope of
 5 the review he had done?
 6 A No.
 7 Q Were you aware that he had only reviewed a couple of
 8 pieces of literature for Peter Hammer as opposed to, for
 9 example, all of the ones that you had reviewed?
 10 A No, I was not aware of issues of scope.
 11 Q Were you aware that after the fact Professor Elhauge wrote
 12 some memo -- I'm sorry. Let me ask it a different way.
 13 Did you receive any e-mail correspondence from Professor
 14 Elhauge after the vote was taken?
 15 A No.
 16 Q Did you receive any from him at any time?
 17 A Recently, about something that's unrelated.
 18 Q But prior to 2002 you had not?
 19 A No.
 20 Q By the way, with respect to e-mail, you have a University
 21 of Michigan e-mail account?
 22 A (Nodding head in affirmative)
 23 Q Correct?
 24 A Yes. Sorry.
 25 Q These things don't record it.

1 wasn't sufficient, that perhaps the other elements were so
 2 strong that they should nonetheless vote for tenure?
 3 A Uh-huh (affirmative).
 4 Q That's correct?
 5 A That's right.
 6 Q Did you decide in your own mind that that was not an
 7 appropriate thing to do?
 8 A That what was not an appropriate thing to do?
 9 Q That it was not appropriate for you to vote in favor of
 10 tenure, even if other elements of the application were
 11 extremely strong?
 12 A Yes, I decided in my own mind.
 13 Q So the basis for your decision was that the scholarship,
 14 as evidenced in the writings of Peter Hammer, did not
 15 warrant tenure?
 16 A Yes.
 17 Q Did you rely to any extent on the outside reviews?
 18 A Yes.
 19 Q Which outside reviews did you rely on as you sit here
 20 today?
 21 A I relied on the outside review by -- I relied on all the
 22 outside reviews. After closely scrutinizing them, I found
 23 some more persuasive than others. I found the review by
 24 Professor Elhauge more persuasive, for example, than the
 25 review by Professor Trebilcock. Those are two people who

1 A Yeah.
 2 Q When you were in Israel did you use that account?
 3 A Yes.
 4 Q Did you have other access to the Internet besides the
 5 University of Michigan e-mail account?
 6 A No.
 7 Q How did you access the Internet from your computer, I take
 8 it, in Israel?
 9 A I had a computer office -- a computer at the office that I
 10 was sitting in in Israel, and information people, the
 11 media people, hooked -- set up a mail program that I could
 12 connect. How they did it I don't know.
 13 Q Did you have any other e-mail address other than your
 14 University of Michigan?
 15 A No.
 16 Q All right. Do you recall considering the issue of whether
 17 or not an individual by the name of Oona Hathaway should
 18 be offered employment at the University of Michigan Law
 19 School?
 20 A Yes.
 21 Q Did that occur at the same meeting that you attended at
 22 which Peter Hammer's tenure was considered?
 23 A No.
 24 Q When did that occur?
 25 A In a different meeting on the very same week, I think, if

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