

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 public,
Defendant.

DEPOSITION OF:

EVAN H. CAMINKER

Monday, October 24, 2005
Green, Green & Adams, P.C.
900 Victors Way, Suite 240
Ann Arbor, Michigan

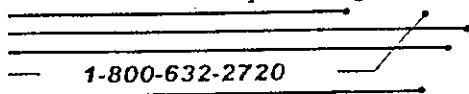
Appearances - PHILIP GREEN, P-14316
Attorney for Plaintiff

RICHARD J. SERYAK, P-26152
Attorney for Defendant

Also present - Steve Croley

Recorded By - NETWORK REPORTING CORPORATION
Sandra K. Harrison, CER-3193

NetworkReporting



1-800-632-2720

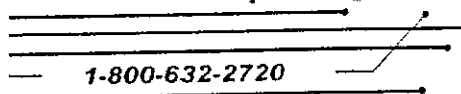
1 Q No, including the judicial clerkship.
 2 A There was at least one case when I clerked on the United
 3 States Supreme Court that was an anti-trust case that I had
 4 some involvement with.
 5 Q And approximately how long ago was that?
 6 A That would have been 1989 or '90.
 7 Q With respect to Peter Hammer's 2002 application for tenure,
 8 did you vote that he should not be granted tenure?
 9 A Yes, I did.
 10 Q And what were your reasons for having done so?
 11 A In my evaluation, the scholarship that Peter Hammer had
 12 produced was substandard and did not rise to the level of
 13 the requirements of our tenure policy.
 14 Q And when you say "scholarship," what in particular are you
 15 referring to?
 16 A The tenure standard asks us to look at three different
 17 categories; scholarship, teaching, and service.
 18 Q Right.
 19 A Within scholarship, that basically means to look at the
 20 scholarly publications that have been produced by a
 21 candidate over the course of their academic career prior to
 22 the tenure decision. So what I would have been looking at
 23 would have been all of the articles that would have been
 24 produced either in final form or in draft form that were
 25 submitted for review by the faculty by, I believe it is,

1 negative conclusion, and ultimately, since I also came to a
 2 negative conclusion, I suppose one could look back in
 3 hindsight and say that those letters had more salience for
 4 me. But it was my conclusion that I was reaching based on
 5 the assistance of the letters --
 6 Q Right.
 7 A -- not a deferral to the letters per se, so --
 8 Q No. And I certainly wasn't asking if you were deferring to
 9 any particular reviewer, only which ones you found more
 10 helpful than others in arriving at your decision that his
 11 scholarship was insufficient to warrant tenure.
 12 A Right.
 13 Q Why don't we break it down?
 14 A Okay.
 15 Q Let's start with the negative or the outside reviewers.
 16 A Okay.
 17 Q As I recall, all of the outside reviewers save for one
 18 recommended that he be granted tenure?
 19 A That is not my recollection.
 20 Q Really? What --
 21 A My recollection is that there were two that did not
 22 recommend tenure.
 23 Q Who were those?
 24 A There was Professor Einer Elhauge, who was -- well, even to
 25 be clear, even he did not recommend against tenure. What

1 October 1st of the year 2001.
 2 Q And in arriving at your decision that his scholarship was
 3 not sufficiently good to warrant tenure, did you rely to
 4 any degree on the -- either the internal or external
 5 reviews or both?
 6 A Can you clarify "rely"?
 7 Q Did you take them into consideration in concluding that his
 8 scholarship was insufficient?
 9 A Yes, I did.
 10 Q Any of the internal reviews in particular that struck you
 11 as being efficacious and helpful in coming to that
 12 decision?
 13 MR. SERYAK: I'm going to object to the form of the
 14 question.
 15 MR. GREEN: What part so I can cure it?
 16 MR. SERYAK: How you're using "efficacious."
 17 Q Were there any internal reviews that you found to be
 18 helpful to you in arriving at your decision that the
 19 scholarship was insufficient?
 20 A Well, I recall reading all of the letters, both internal
 21 and external, very carefully and looking at them to see
 22 where and how they dovetailed with my own understanding of
 23 the case based on my own reading of the articles. So in
 24 some sense, I would say all of them were helpful. There
 25 were certainly some that there were -- that came to a

1 he said was based on the two articles that he evaluated he
 2 would not grant tenure. He didn't read every article in
 3 the file. But he did say based on his evaluation of these
 4 two pieces, he did not think that Peter Hammer's
 5 scholarship was of the high quality and standard that would
 6 be befitting a tenured member of the Michigan faculty.
 7 Q All right.
 8 A There was a second letter by Professor Jim Blumstein, who
 9 basically at best was equivocal, and my memory is that he
 10 actually said we shouldn't make a decision on tenure yet;
 11 that we should wait until the next installment of what was
 12 suppose to be a multi-stage research project. So let me
 13 back up for a second.
 14 One of the projects that Peter worked on after his
 15 2000 suspension of tenure consideration prior to his 2002
 16 consideration was a multi-stage research project having to
 17 do with the ways in which courts consider quality of care
 18 in the context of anti-trust decisions dealing with medical
 19 care, inclusion of hospitals. The only piece that came out
 20 in time for us to review was the first of a series of
 21 pieces; that was something co-written with Professor Bill
 22 Sage from Columbia and published in the Columbia Law
 23 Review, and it is my recollection that Professor Blumstein
 24 said that he would recommend that we wait until we see
 25 further payoff out of that project before he would make the

NetworkReporting



1-800-632-2720

1 recommendation -- if he were us, before he would make a
 2 decision on tenure.
 3 Having said all that, frankly, that is a Clote
 4 negative, let me put it that way. It is clear from my own
 5 experience and others in reading letters that essentially
 6 anything at that point that is equivocal is basically the
 7 outside writer's way of saying, "I would not grant tenure";
 8 but their way of trying to write the letter delicately
 9 enough so if the faculty decides to vote in favor of tenure
 10 anyway, they would be successful, if necessary, in
 11 defending that decision with any higher administration. So
 12 I would be -- whatever his bottom line was, which my
 13 recollection was "I would wait," it was clear to me he was
 14 saying that the article is not up to snuff.
 15 Q When is the last time you reviewed Professor Blumstein's
 16 letter?
 17 A I cannot now recall. I did -- prior to this meeting, I did
 18 skim read through aspects of Peter's file. I can't
 19 remember whether or not that was something that I actually
 20 read. My -- it may be that the conclusion was reported in
 21 the Tenure Committee Report.
 22 Q I see.
 23 A So I can't remember whether I read it from the Committee
 24 Report or whether I glanced at the actual letter.
 25 Q Okay. Were either of those two letters helpful to you in

1 WITNESS: Okay.
 2 Q And when you say "after having received input from the
 3 tenure candidate," does the tenure candidate have the
 4 opportunity to object to any particular outside reviewer?
 5 A I believe in this case the answer is "yes."
 6 MR. GREEN: Excuse me a second.
 7 (Off the record)
 8 Q Were you part of the faculty in 2000 that decided to defer
 9 the tenure decision on Peter Hammer?
 10 A Yes, I was.
 11 Q Were you aware at that time that Einer Elhauge had been
 12 eliminated from the list of outside reviewers at the
 13 request of Mr. Hammer?
 14 A I'm --
 15 MR. SERYAK: I'm going to object for lack of
 16 foundation. Subject to that --
 17 WITNESS: Yeah.
 18 MR. GREEN: Well --
 19 Q Go ahead, you can answer.
 20 A Well, there's a premise in your question which I do not
 21 know if it's accurate or not.
 22 Q And the premise is whether or not he was eliminated?
 23 A That's correct. I have no knowledge one way or the other
 24 of whether he was considered eliminated or anything else.
 25 Q Okay. How about the inside reviewers? Do you recall who

1 arriving at your decision?
 2 A Those two were quite helpful. Jim Blumstein is thought of
 3 as a very highly regarded expert in the country in health
 4 care and health care policy; and Einer Elhauge is very
 5 highly regarded an expert in anti-trust, and he himself has
 6 some experience in the medical care context. What makes a
 7 letter particularly useful is the level of detail, and one
 8 thing that I would note particularly with Professor
 9 Elhauge's letter is that it is extremely detailed in
 10 explaining in a variety of different ways where he thought
 11 the shortcomings in -- my memory is he looked at two
 12 different pieces, the two major pieces that Peter was
 13 relying on for tenure. And so letters become helpful when
 14 they become specific. When they're specific, they allow
 15 me, personally, and other members of the faculty to then
 16 really engage them and try and understand are these
 17 persuasive criticisms or not and allow us to go back to the
 18 underlying articles and make judgments about whether or not
 19 the criticisms are fair or not fair. So, in general, I
 20 would say those were two very useful criticisms.
 21 Q How are the external reviewers selected?
 22 A The Tenure Committee is the committee that decides from
 23 whom to solicit outside letters after having received input
 24 from the tenure candidate. So I do not believe --
 25 MR. SERYAK: Well, I think you've answered that.

1 had recommended against tenure as inside reviewers?
 2 A By "reviewers," you mean people who wrote letters to the
 3 file?
 4 Q Right.
 5 A I can think of two right now, although I can't recollect if
 6 there may have been others. I know that Professor Omri
 7 Ben-Shahar wrote a critical letter, and I know that
 8 Professor Sallyanne Payton wrote a critical letter. And
 9 there may have actually been more than one letter by
 10 Sallyanne Payton. She may have written both in 2000 and
 11 2002. I don't remember.
 12 Q Okay. Sticking with 2002 for now, what is the area of
 13 expertise of Sallyanne Payton?
 14 A Her expertise is in health care policy, administrative law.
 15 Q How about Omri Ben-Shahar?
 16 A He is a law and economics professor, law and economics
 17 expert. Much of his writing is in contracts and commercial
 18 law.
 19 Q How long has he been on faculty, if you know?
 20 A I cannot recall exactly. It would have been approximately
 21 1999 or 2000.
 22 Q To your memory, is this the first time that he had been
 23 involved in writing a review letter with respect to an
 24 application for tenure?
 25 A That is correct. It would have been the first time he was

NetworkReporting

1-800-632-2720

1 is taken; is that correct? Or the final vote?
 2 A No; that's incorrect.
 3 Q I'm sorry. Then I'm a little hazy on the process.
 4 A The tenure review process is one according to which the
 5 faculty always meets twice.
 6 Q Right.
 7 A They meet first to discuss the case in a context where it
 8 is only discussion of the case, where there is no vote of
 9 any sort taken. At the second meeting, which we might call
 10 the decision-making meeting, there is a process by which at
 11 some point in time after a lot of discussion a straw vote
 12 is taken prior to the final binding vote.
 13 Q Well, with respect to the conversation that you had between
 14 the two tenure meetings in 2002, would you relate to me as
 15 best you can recall the substance of that meeting?
 16 A Sure. Professor Ben-Shahar, as your previous question had
 17 suggested, wrote his letter in a blunt fashion. It was
 18 not, shall we say, sugar-coated in any way, and he came to
 19 me because I think a couple of his colleagues that
 20 raised -- or one colleague had raised with him the question
 21 of whether or not his -- the -- just raised the question
 22 about the bluntness of the letter and what it meant. And
 23 Professor Ben-Shahar wanted to solicit my opinion as then
 24 associate dean as to whether or not there was some cultural
 25 norm that would have been expected of people writing

1 letters. As we said before, this is the first time that
 2 Professor Ben-Shahar had been included in a tenure
 3 decision, and it was the first time he had been asked to
 4 write such a letter by the committee, and he was basically
 5 coming to ask me whether or not there are norms of
 6 presentation that should be followed.
 7 Q Was it your understanding that he had rewritten his letter
 8 as a result of the concern over the bluntness as of the
 9 time that he spoke with you?
 10 A I do not recall at this point in time that we had any
 11 conversation about there being more than one form of the
 12 letter. I would say that based on this e-mail that you
 13 showed me --
 14 MR. SERYAK: Well, just try to answer the -- I think
 15 you've answered the question.
 16 WITNESS: Okay.
 17 MR. GREEN: Just let him tell it.
 18 MR. SERYAK: I mean, he can continue, but I --
 19 MR. GREEN: I mean, it just -- it will probably
 20 shorten things if -- if not --
 21 WITNESS: Well --
 22 MR. GREEN: But I don't want to interfere with your
 23 advice to him, so why don't we move on?
 24 Q This conversation, then, would have been sometime around
 25 February 12th, give or take a few days, I take it, of 2002?

1 A I don't now recall the exact date of the second tenure
 2 meeting.
 3 Q I think the second tenure meeting is February 19th of 2002.
 4 I may be off by a day, so these are just approximations.
 5 But if it was around February 19th, you're talking about
 6 February 12th, plus or minus a day or two, I take it?
 7 A It might have been closer to the 19th, then. I just don't
 8 know. It was sometime between a day and a few days before
 9 the tenure meeting. And I -- my present recollection is
 10 that it was before the second tenure meeting.
 11 Q We'll get to it. Unfortunately, I've got everything
 12 chronologically here, so I should have done it by topic.
 13 Who is R. J. Morris?
 14 MR. SERYAK: Was that Morris?
 15 Q Morris, M O R R I S.
 16 A It is possible that that is Roberta J. Morris, who is an
 17 adjunct professor at the Law School.
 18 Q And Brian Simpson?
 19 A Brian Simpson is a tenured member of the faculty.
 20 Q And do you recall whether or not Brian Simpson voted
 21 favorably or unfavorably on the tenure application in 2002
 22 of Peter Hammer?
 23 A I do not currently have an independent recollection of how
 24 Professor Simpson voted. I believe we have supplied --
 25 Q Yeah, I've got a list.

1 A Okay.
 2 Q Well, I actually have a list that is a combined list of
 3 abstentions and negative votes without identifying who the
 4 abstentions are. So you have no recollection as you sit
 5 here, I take it, whether Professor Simpson was a negative,
 6 an abstention, or a positive vote?
 7 A I do not currently have any recollection of that, no.
 8 Q Okay. Was there in 2002 an undercurrent -- sarcastic
 9 undercurrent concerning Peter Hammer and perhaps on the
 10 topic of how well Peter Hammer may have thought of himself?
 11 MR. SERYAK: I would just object to the form of the
 12 question, but go ahead and answer.
 13 A I'm not aware of any such conversation or undercurrent.
 14 (Deposition Exhibit 2 marked)
 15 Q You now have in front of you what's marked as Deposition
 16 Exhibit Number 2. Have you ever seen this document before?
 17 A Not to my recollection.
 18 Q And this document appears to be an e-mail sent to Brian
 19 Simpson from R. J. Morris, dated February 14, 2002, and the
 20 subject is aesthetic nuisance. Do you have any knowledge
 21 of what that is a reference to?
 22 MR. SERYAK: I'm going to object for lack of
 23 foundation.
 24 MR. GREEN: It's a foundation question.
 25 Q Go ahead.

NetworkReporting

1-800-632-2720

6 (Pages 18 to 21)

a5dd3ed3-e3b8-4137-bd24-a669a0a50207

1 the University was from people in the Civil -- I'm sorry --
 2 in the Human Rights field. So, frankly, I would interpret
 3 that sentence as, if not entirely about Oona, at least
 4 being partly about Oona; basically saying that the hiring
 5 of her in the Human Rights field was a bad week for human
 6 rights for somebody who thought that she was not likely to
 7 be a productive human rights scholar.
 8 Q Now, with reference to the response by Catharine MacKinnon,
 9 you'll note that she says that the tenure decision as it
 10 regards to Peter Hammer makes her very sad?
 11 A Yes.
 12 Q In your conversation with her yesterday, did she express
 13 that sentiment?
 14 A She didn't say anything about her feelings one way or the
 15 other.
 16 Q Okay. And between the time of this vote and your
 17 conversation with her yesterday, you had no conversations
 18 with her respecting the tenure decision regarding Peter
 19 Hammer?
 20 A Not that I recall, no.
 21 Q After the tenure vote, almost immediately after, within a
 22 matter of days, did the topic of whether or not Peter
 23 Hammer was going to teach the following year -- the
 24 following academic year -- come up in discussions between
 25 yourself and Jeff Lehman?

1 A Yes. I'm sorry, you did say after 2002; right?
 2 Q Yeah.
 3 A Yes.
 4 Q And were you at all surprised by Peter Hammer's willingness
 5 to teach an additional year after having been denied
 6 tenure?
 7 A I don't recall being surprised particularly about it, no.
 8 Q Did you have any concerns about him remaining on faculty
 9 for a year after the denial of tenure to him?
 10 A Can you specify "concerns"? Concerns of what sort?
 11 Q Any concerns?
 12 A I can't now recall having particular concerns. Obviously,
 13 there's a potential for awkwardness, but I think that would
 14 have been for Peter to make the decision about whether or
 15 not he would have wanted to stay or leave.
 16 Q Well, within a matter of a week or so after his denial of
 17 tenure, didn't it appear to you that Peter Hammer was
 18 attempting to find out who voted against his tenure, if not
 19 why?
 20 A Yes, it did appear to me.
 21 Q And didn't that occur at approximately the same time frame
 22 as your offering or the topic of whether or not to offer
 23 him an additional year's contract arose between yourself
 24 and Jeff Lehman?
 25 MR. SERYAK: I'll object to the lack of foundation of

1 that question. I don't think that -- I think that
 2 misstates the prior testimony.
 3 Q You can answer.
 4 A I did not have a role in the decision as to whether or not
 5 Peter Hammer was going to stay at the Law School for
 6 another year or not. My conversations with Jeff Lehman
 7 right after, maybe within a -- you know, a couple of days
 8 or so I think -- maybe a week -- after he had talked to
 9 Peter, which was the day after the tenure decision, were
 10 such that Dean Lehman had confirmed an understanding that
 11 upon the denial of tenure in 2002 Peter, if he chose, would
 12 be able to stay for one more year; that would be deemed his
 13 terminal year. And so as it was presented to me by Jeff
 14 Lehman, he had had that conversation with Peter. Peter had
 15 said, "Yes, I still plan to stay here for that terminal
 16 year." I vaguely recall I had some confusion for a moment
 17 as to whether or not that meant he wanted to teach for that
 18 terminal year as opposed to still remain on the faculty but
 19 take the opportunity, let's say, to go visit at another
 20 school.
 21 Q You keep referring to it as his "terminal year."
 22 A Correct.
 23 Q Are you saying that when you discussed it with Jeff Lehman
 24 that the two of you referred to it as his terminal year?
 25 A Terminal year, last year.

1 Q That's the way you would have referred to Peter Hammer
 2 teaching for the following academic year?
 3 A That's correct.
 4 Q And that would be true whether in discussion or e-mail?
 5 A It -- I'm sure -- I don't recall any particular e-mails
 6 about it, but I'm reasonably sure it would, yes.
 7 Q Okay.
 8 A So -- well, to get back to your specific question: So I
 9 did have conversations then with Peter about his teaching
 10 for the following year once it was clarified to me that he
 11 decided that he wanted to stay there for the final year of
 12 '02-'03.
 13 Q And those conversations would have been late February or
 14 early March of 2002?
 15 A That is correct.
 16 Q And in each of your conversations with Peter, are you also
 17 indicating that whenever you referred to the following
 18 academic year in those conversations it was as the final
 19 year or the terminal year?
 20 A I do know that in my communications with Peter, including
 21 that one where I first talked to him about confirming his
 22 teaching for the following year, I would have said
 23 something like, you know, "In your last year here do you
 24 want to -- are you going to teach? Do you still want to
 25 teach the courses you were going to teach," et cetera.

NetworkReporting

1-800-632-2720

10 (Pages 34 to 37)

a5dd3ed3-e3b8-4137-bd24-a669a0a50207

1 transpired at the meeting or a synopsis of the case. In my
 2 discussion with Peter about what trans -- about my own
 3 views of the meeting, I recall discovering that it was
 4 somewhat difficult, particularly when pressed by the
 5 candidate for more detail, or rebuttals to my statements
 6 to -- to -- the line between saying what I felt about his
 7 scholarship and what may have been felt about his
 8 scholarship by others was a difficult one. But I do not
 9 remember walking in and saying -- in a sense, having to
 10 change my mind on the policy judgment; that Peter ought to
 11 be entitled to a run-down of a -- this was said and then
 12 this was said and then this was said.

13 Q But you felt it appropriate for you to share your views
 14 with him on his application or the merits of his tenure
 15 application; correct?

16 A With one caveat. I did not feel it was appropriate to
 17 reveal to Peter how I had voted. So by "views," what I
 18 mean is I felt it was appropriate to say, here's where I
 19 thought the strengths were in the scholarship; here's where
 20 I thought the weaknesses were in the scholarship, and try
 21 and give him a balanced sense by that, in part because I
 22 was not a particular outlier, I don't think, with the no-
 23 votes, I think. So I did not tell him how I voted.

24 Q No, I understand. But you were trying to give him your
 25 view of his scholarship as opposed to anyone else's view of

1 his scholarship?

2 A That was my attempt, yes.

3 Q All right. And you were representing it to him as your
 4 view of his scholarship; correct?

5 A That is --

6 Q Or were you representing it as the institution's view of
 7 his scholarship?

8 A No. I was trying to represent it as my view of his
 9 scholarship is my best recollection at this moment.

10 Q And you were in the minority in terms of the individuals
 11 who voted against his tenure application; correct?

12 A I'm sorry. Could you rephrase the question or re-ask the
 13 question?

14 Q Well, what was the tenure vote for Peter Hammer?

15 A There were 18 faculty members voting in favor of tenure and
 16 14 faculty members either voting against tenure or not
 17 voting.

18 Q How many were there voting against tenure?

19 A I believe 12.

20 Q So 18 of those who voted were in favor and 12 were against?

21 A That is -- well, technically, because an abstention counts
 22 as a no-vote, I would have said 14 were against. If you
 23 are in favor of tenure, you have to affirmatively vote in
 24 favor of tenure, and that is understood as part of the
 25 voting protocol.

1 Q How many more votes -- affirmative votes would he have had
 2 to have gotten to have achieved tenure?

3 A I believe, if I recall this correctly, the answer is he
 4 would have needed ten more favorable votes.

5 Q So he would need 28 votes --

6 A If you're talking about --

7 Q -- for -- at --

8 A Out of the denominator that that would have created, that
 9 is correct. I think he would have then needed -- if he had
 10 28 favorable votes and there were 14 people who were either
 11 voting "no" or abstaining, then that would have been 28 out
 12 of 42, which I think is the requisite two-thirds majority.

13 Q And there's a written policy that describes that count
 14 process?

15 A I believe the tenure standard specifies that it -- that you
 16 need to have two-thirds -- a favorable vote of two-thirds
 17 of the faculty members present at the meeting.

18 Q Irrespective of that, would you agree with me that of the
 19 people present and voting, including abstentions as a vote,
 20 that you were in the minority? In other words, your view
 21 contrary to tenure was a minority view?

22 A Yes, I'm sorry. I didn't quite catch how you were asking
 23 the question before.

24 Q And Deborah Malamud -- was she present for the vote?

25 A That would be indicated in the minutes. To the best of my

1 recollection, the answer is "yes."

2 Q And would you agree with me that she was someone who voted
 3 in favor of tenure?

4 A I know that when she was on the Tenure Committee she wrote
 5 a concurring letter indicating why she -- on the committee
 6 she voted in favor of tenure. I don't have now an
 7 independent recollection of how she voted in the final
 8 case.

9 WITNESS: Actually, would this be a good time to take
 10 ten-minute break so I can --

11 MR. GREEN: Whenever you want. Anytime is a good
 12 time.

13 WITNESS: Okay. Great. Thank you.
 14 (Off the record)
 15 (Deposition Exhibit 5 marked)

16 MR. SERYAK: Is this five?

17 MR. GREEN: This is five.
 18 (Witness reviews exhibit)

19 A Okay. Thank you.

20 Q You're familiar with this document?

21 A Yes.

22 Q And for the record, this is a series of e-mails that starts
 23 with an e-mail that was sent from Peter Hammer to Don
 24 Herzog, who forwarded it to Jeff Lehman for his comments;
 25 and it in turn was forwarded to you, and you responded.

NetworkReporting

1-800-632-2720

12 (Pages 42 to 45)

a5dd3ed3-e3b8-4137-bd24-a669a0a50207

1 The last in the series is your response to Jeff Lehman,
2 dated February 26th, 2002?
3 A That appears to be correct.
4 Q Okay. With regard to -- well, let me start over. I'm
5 sorry. The initial e-mail is an e-mail to Don Herzog which
6 essentially seeks information about the tenure process
7 involved; correct?
8 A Seeks information about the tenure decision, I would say.
9 Q Okay. Fair enough. And rather than responding to that,
10 it's your understanding that Professor Herzog sought
11 advice, if you will, from Jeff Lehman, and he, in turn from
12 you?
13 MR. SERYAK: I'll object for lack of foundation.
14 A I -- it does appear to me that he might be seeking advice
15 from Jeff. I'm not quite sure I follow the "in turn from
16 you" part.
17 Q Okay.
18 A Jeff clearly forwarded the e-mail to me. It wasn't clear
19 to me he was asking for my advice. It appears from the e-
20 mails that Jeff it out of town at this point in time, in
21 Japan.
22 Q Okay. And in your response to Jeff Lehman, you indicate
23 that you've e-mailed Kyle, Don, and let's see, Kyle told me
24 that Bill Miller received the same e-mail. Kyle is Kyle
25 Logue?

1 A That's correct.
2 Q And Don is Don Herzog or is there another Don?
3 A I assume I meant Don Herzog. There is another tenured
4 member of the faculty named Don Regan, but from the context
5 I assume it means that I have responded to Don Herzog.
6 Q Now, in your response to Jeff Lehman, reading in the second
7 paragraph, "I'm inclined to be the fall guy, and use the
8 occasion" -- referring to a meeting that you were going to
9 have with Peter -- "to talk with Peter, playing dumb as to
10 his requests of others." By that did you mean that you
11 were not going to let on to Peter that you were aware that
12 he had made requests of others concerning the tenure
13 decision?
14 A That's my present recollection of what I would have meant,
15 yes.
16 Q And can I -- can we take it a step further? Had Peter
17 asked you whether or not you knew about the requests of
18 others, what were you prepared to tell him at that time?
19 A Had Peter asked me if I knew he had inquired of others?
20 Q Right.
21 A I'm sure I would have said "yes."
22 Q Okay. So when you indicate "playing dumb," it was meant
23 that you wouldn't raise the topic?
24 A That's my assumption of what I would have meant, yes.
25 Q At the end of this response to Jeff Lehman, you indicate

1 that you're going to try and steer the conversation away
2 from the Columbia piece? What is that a reference to?
3 A I don't think that's what I say. I say we'll try to steer
4 conversation about the Columbia piece --
5 Q I'm sorry.
6 A -- into constructive criticism; about things they can do in
7 the editing process. The reference is the following: The
8 Columbia piece, which was the second major piece of
9 scholarship that was in Peter's file, was still in draft
10 form, and it's easier to speak about the strengths or
11 weaknesses of a case if one could say, I'm sharing this
12 with you in light of the ways in which if I were you I
13 would improve the piece. So what I simply meant is as a
14 matter of psychology I thought it would be easier to tell
15 Peter, you know, "This piece is still a work in progress.
16 Here's how I think you can improve it. Here are the
17 failings that I think it has and ways in which I think you
18 can do better."
19 Q Was the Columbia piece one of the major considerations in
20 your mind in voting against tenure for Peter Hammer?
21 A Well, it was one of the pieces that -- that -- I'm trying
22 to be clear how he put it. It's sort of like a negative --
23 the -- I voted against Peter because looking at the corpus
24 of his scholarship I did not think that there was
25 sufficient quality to satisfy our tenure standard.

1 Q Right.
2 A The Columbia piece would have been a piece -- one of the
3 major pieces that could have, but in my view did not
4 satisfy that standard.
5 Q Is that the piece that he co-authored with Bill Sage?
6 A Yes.
7 Q And is it your understanding when you used the term "co-
8 authored," that each of them wrote portions of it?
9 A I do not have personal knowledge about how they constructed
10 that piece. I would have assumed it meant that both of
11 them had input. Whether they wrote separate sections or
12 edited each others sections, I don't know.
13 Q And it was your feeling that at least as of the time of the
14 tenure decision that that piece -- the scholarship of that
15 piece would not have warranted a grant of tenure at U of M?
16 A That is correct.
17 Q Who is Bill Sage?
18 A He is a faculty member now tenured at Columbia Law School.
19 Q Do you know when he was tenured at Columbia Law School?
20 A I have a sense it was around the same time frame that Peter
21 was being considered. Whether it was the exact same year
22 or one or two before or after, I don't recall.
23 Q Do you know him personally?
24 A I do not think we've ever met. I have this recollection
25 now that we have a friend in common that we discovered

1 after the fact who is a friend of mine in Los Angeles. To
 2 my recollection, though, I've never actually communicated
 3 with him other than in e-mail, and I don't think I've ever
 4 met him.

5 Q Have you ever seen any of the other work that Bill Sage has
 6 authored?

7 A I believe there was a second piece in the tenure file that
 8 he and Peter Hammer had written together. Other than the
 9 pieces that he would have co-written with Peter Hammer, I
 10 do not believe I've ever carefully read anything else that
 11 Bill Sage has written.

12 Q And the other piece that he had co-authored with Peter
 13 Hammer, did you also believe the scholarship of that piece
 14 was inadequate in terms of a positive or favorable tenure
 15 vote?

16 A Yes. But to be clear, the judgment about adequacy isn't
 17 solely limited to a piece-by-piece evaluation. It's a
 18 holistic evaluation of the entirety of the body of the
 19 scholarship. But by inference it, therefore, yes, means
 20 that I did not think that piece of its own merit was enough
 21 to carry the day.

22 Q Now, a few moments ago we touched on the subject of whether
 23 it appeared that Peter Hammer was attempting to find out
 24 what the negative vote consisted of. Do you recall that?
 25 (Deposition Exhibit 6 marked)

1 Q Let me show you what is being marked as Deposition Exhibit
 2 Number 6. Do you recall this document?
 3 (Witness reviews exhibit)

4 A Yes, I do.

5 Q And, for the record, this starts out as an e-mail from
 6 Steven Croley to you and your response, dated March 1st,
 7 2002; correct?

8 A It appears so, yes.

9 Q And in your response, you indicate to Steve Croley -- I'm
 10 sorry. In your -- I'm sorry. You're forwarding it to Jeff
 11 Lehman. In your forwarding it to Jeff Lehman, you indicate
 12 that Steve Croley has received an e-mail message that the
 13 other no-voters received and you indicated it looks like a
 14 pattern?

15 A That's what I do say, yes.

16 Q Okay. Do I take it that as of March 1st of 2002 you were
 17 aware of the identity of the no-voters?

18 A I do not recall that I would have necessarily known of all
 19 of the no-voters. I -- this e-mail makes clear that as a
 20 pattern emerged of Peter having selectively sent an e-mail,
 21 either identical or substantially similar to the one we
 22 looked at that he sent to Rick Lempert, that I believe all
 23 of the people he sent such an e-mail to had voted "no."

24 Q Was Rick Lempert a no-voter?

25 A Well, now that you mention it, I don't think Rick was. So

1 it would have -- it could have been to others.

2 Q And to your knowledge, did you -- I'm sorry. Did you
 3 canvass the tenured faculty to find out who had received e-
 4 mails and who hadn't or did you instead rely on them to
 5 come to you when they had received word from Peter Hammer?

6 A I certainly don't recall canvassing either the entire
 7 faculty or even the people who I had thought I would have
 8 recalled voting "no." I have no recollection of that.

9 Q You were aware that Deborah Malamud had also received
 10 inquiry from Peter Hammer and a desire to discuss her vote;
 11 right?

12 A I'd have to go back and look at the date to see whether I
 13 was aware of it at the time of this e-mail or not.

14 Q Your e-mail to Deborah Malamud, I think, was the 26th --
 15 let me make sure --

16 A No.

17 Q No. It was actually, was the 27th of February 2002. It's
 18 Exhibit 4. So this is two days later?

19 A That is correct. I do not have a recollection that Deborah
 20 received the e-mail that we're talking about.

21 Q She was contacted, at least, by Peter?

22 A I don't know whether Peter contacted her or if she
 23 contacted him first.

24 Q Well, referring to Exhibit 4, about four lines down, "I
 25 fully understand Peter's set of questions and agree they

1 are not -- they are reasonable and predictable." Do you
 2 see that?

3 A In my e-mail, yes.

4 Q Yeah. And if you look further back in that e-mail, you can
 5 see the e-mail from Peter Hammer to her, can you not or to
 6 Rick Lempert?

7 A Yes, but that is not the same e-mail -- if you give me just
 8 one second. That is not the same e-mail that he had sent
 9 to Don Herzog.

10 Q No, but he had sent one to Rick Lempert in which he posed a
 11 series of questions concerning the vote, did he not? Which
 12 then got forwarded --

13 A Yes. A different -- a different e-mail.

14 Q -- by Peter --

15 A Yes.

16 Q -- to Deborah Malamud; correct?

17 MR. SERYAK: That's where I'm going to object for lack
 18 of foundation.

19 Q What is there that you don't understand on page 2 where
 20 Peter sends it to Deborah Malamud with the following
 21 sentences: "FYI. This is a message I sent to Rick. It
 22 provides a fairly accurate summary of the types of things I
 23 am thinking about." Okay? So let's get back to where we
 24 were. Exhibit 4 shows, does it not, that Deborah Malamud
 25 received an e-mail from Peter Hammer questioning what had

NetworkReporting

1-800-632-2720

14 (Pages 50 to 53)

a5dd3ed3-e3b8-4137-bd24-a669a0a50207

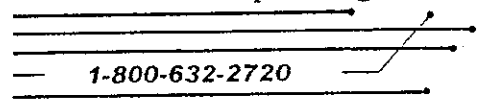
1 My question is -- I don't want to mischaracterize or
 2 lead -- but did you have any conversations with Peter
 3 Hammer regarding '02-'03 as being his last year?
 4 A Yes, I did.
 5 Q Okay. And would you tell us when those first started?
 6 A I believe the first one would have been my first contact
 7 with Peter after the decision when I wanted to talk to him
 8 to clarify the issue of his continuing to teach for the
 9 following year -- for the '02-'03 year.
 10 Q Would that have been a time when if he was going to teach
 11 he would have select classes?
 12 A My memory is that those classes would have already been in
 13 the tentative schedule. The timing is such that I believe
 14 we have students sign up for classes in March, so the time
 15 of the tenure decision was right around the time at which
 16 all of that would be final -- be coming pretty fixed in
 17 stone.
 18 Q And what did you tell him with respect to the next year?
 19 Whether you used the word "terminal" or "final" or "last,"
 20 how did you put it to him?
 21 A Well, I remember going over what my understanding from Jeff
 22 Lehman was and saying that, "It is my understanding that
 23 you and Jeff have agreed that you would be able to stay on
 24 for one additional year." I can't remember if I used the
 25 word "last," or "final," or "terminal," but I was very

1 to me about several different places, because he would come
 2 talk to me about the potential for releasing whatever
 3 information from the tenure file we felt comfortable
 4 releasing, and those, I'm sure, included Toledo. I'm
 5 confident I was aware of his effort to develop a
 6 relationship at Wayne -- Wayne State. I knew of his
 7 discussions at University of Maryland. I knew that there
 8 was some initial conversation with San Diego. Those are
 9 the four places that immediately come to mind. Those are
 10 of the external places. And in each of these conversations
 11 the context would be where can you find a job for the '03-
 12 '04 academic year and beyond that would hopefully allow him
 13 to breach the -- to make sure he didn't lose partnership
 14 benefits.
 15 Q Did Peter Hammer ever come to you in the winter or spring
 16 of '03 and ask to select classes for the '03-'04 year?
 17 A He did not.
 18 Q Counsel asked you about the scrambled -- the version of the
 19 scrambled commentary that -- and am I correct that this
 20 went on for more than 120 pages?
 21 A I thought I saw a reference in one of these e-mails to 131
 22 pages.
 23 Q Did the Law School -- either your office or the Dean's
 24 Office -- did the Law School retain the unscrambled
 25 versions of these documents?

1 clear. I was saying, "You can stay on for one more year
 2 while you're looking for a new job." And I wanted to
 3 clarify with him that he wanted to make sure that he --
 4 that he wanted to actually teach here during that year as
 5 opposed to, for example, use it as a time to go visit at
 6 some other law school with which he might want to develop a
 7 potential permanent relationship.
 8 Q And what did he say in response to that?
 9 A We discussed the fact that he wanted to teach again. I
 10 don't remember it being a long conversation. I remember he
 11 did say, "I do want to teach here again over the next
 12 year." We had --
 13 Q Were there any other conversations that you had with him
 14 regarding '02-'03 year being his last year?
 15 A We had a number of conversations throughout that spring and
 16 summer that were about his job search, both a job search
 17 for positions outside of the University and a job search
 18 for positions inside of the University; and his repeatedly
 19 saying that he was very anxious to make sure he found
 20 another place of employment for the next year that would
 21 offer his partner -- that would offer him partnership
 22 benefits under whatever the relevant medical plan would be
 23 so that his partner would have continuous coverage.
 24 Q Did Professor Hammer tell you where he was applying?
 25 A I know at some point over the summer he specifically talked

1 A Absolutely.
 2 Q Were any of those destroyed?
 3 A Not -- certainly not to my knowledge.
 4 Q Counsel had asked you whether there was anything in
 5 writing -- I believe it was a broad question -- with
 6 respect to this confidentiality for reviewer comments,
 7 internal and external. Do you recall that question?
 8 A Yes, I do.
 9 Q Do you know whether the committee that's assembled for any
 10 tenure candidate -- whether the committee corresponds with
 11 external reviewers?
 12 A I believe it is the general practice -- and I believe it
 13 happened in this case -- that the chairperson of the
 14 committee or a member of the committee would correspond in
 15 writing when soliciting a letter from an internal or
 16 external candidate. At least from the external candidates.
 17 Q Do you know whether that letter makes any reference to
 18 confidentiality or assurance of confidentiality to the
 19 recipient?
 20 A I believe the answer is that it regularly does, and there
 21 was an excerpt of one of these e-mails that seemed to be
 22 quoting from Professor Rob Howse's letter to an external
 23 writer that made clear there it was a commitment of
 24 confidentiality of sorts.
 25 Q I'm going to ask you that you take a look at Deposition

NetworkReporting



1 Q Okay. So that would be one individual who is totally
 2 uninvolved in the decision, then, making the judgment as
 3 opposed to a subset of the faculty itself?
 4 A That is correct.
 5 Q And that, you feel, is at least philosophically preferable?
 6 A Yes. I think I would also add that somebody could always
 7 bring a complaint to the Dean -- again, not as part of the
 8 formal grievance process. But I fully suspect that any
 9 good dean would be available to listen to such a complaint.
 10 Q Listen to the complaint in what context?
 11 A I'm not sure what you mean.
 12 Q Well, in this case, Jeff Lehman is a good dean; right?
 13 A I thought so.
 14 Q If he believed that there was discrimination in the process
 15 that involved Peter Hammer's application for tenure, he
 16 couldn't do anything about it, could he?
 17 A Jeff specifically invited Peter if he had any information
 18 that would lead to the plausibility that there was
 19 discrimination that he should bring it to Jeff and Jeff
 20 would figure out a way to have that looked into.
 21 Q Assuming that Peter Hammer brought concrete,
 22 incontrovertible evidence that several individuals were
 23 motivated by anti-gay animus in the process of granting
 24 tenure, wouldn't you agree with me that Jeff Lehman was
 25 powerless under the process that was available to do

1 members and his perception that those events that he was
 2 describing evidenced an anti-gay bias?
 3 A I heard what he said at the deposition; that is correct.
 4 Q Did you then go back to the faculty members about whom the
 5 anecdotes were told to confirm or otherwise to gain
 6 information about whether the events occurred?
 7 A I did not.
 8 Q So that would not have been, for example, the way the topic
 9 had arose with David Chambers about whether or not Peter
 10 was denied tenure because he was gay?
 11 A That would not have been, no.
 12 Q Fair enough.
 13 MR. GREEN: No further questions.
 14 MR. SERYAK: Just a last one.
 15
 16 EXAMINATION BY MR. SERYAK:
 17 Q Have you ever heard of the Office of Equity and Diversity
 18 within the University?
 19 A I have heard that title or of an entity with a similar
 20 sounding title. There are many of them.
 21 Q And the name may have been changed, but is that one of the
 22 offices that Peter Hammer could have contacted with respect
 23 to his discrimination claim?
 24 A I would have thought so. My recollection is that the
 25 Provost specifically invited Peter to -- if Peter actually

1 anything to alter that decision?
 2 A I would agree that he was -- that under the -- a formal
 3 grievance review process he would -- he would not -- that
 4 that formal grievance review process would not have
 5 jurisdiction over that kind of a claim.
 6 Q And would you also agree that he was powerless to overrule
 7 the vote of the faculty on a decision of tenure,
 8 irrespective of whether he believed discrimination occurred
 9 or not?
 10 A I believe as a formal matter, that is probably correct, but
 11 I do not know for sure.
 12 Q Okay. So when you said a good dean would listen, you were
 13 talking about in the sense that the person might comfort
 14 and counsel the aggrieved?
 15 A Not limited to that. The person -- one thing a dean could
 16 do is advise the grievant to go to someone outside of the
 17 Law School but within the University.
 18 Q I guess one last area --
 19 MR. GREEN: And you did not cover this on your
 20 recross, so if you want to object go ahead. I assume you
 21 will.
 22 Q You've reviewed Peter Hammer's deposition. You attended
 23 his deposition; correct?
 24 A That is correct.
 25 Q You heard anecdotal testimony involving certain faculty

1 had evidence of discrimination, to bring it directly to the
 2 Provost.
 3 Q Do you know whether --
 4 A But I believe he also he could have also gone directly of
 5 his own accord to that office. I think there's also an
 6 Affirmative Action Office; that may or may not be the same
 7 thing.
 8 Q Do you know whether Peter went to any of those offices;
 9 Affirmative Action, Equity and Diversity?
 10 A I have not heard anything that suggests to me that he did.
 11 MR. SERYAK: That's all I have.
 12 MR. GREEN: No further questions.
 13 (Deposition concluded at approximately 3:40 p.m.)
 14
 15 -0-0-0-
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

NetworkReporting

1-800-632-2720

37 (Pages 142 to 145)

a5dd3ed3-e3b8-4137-bd24-a669a0a50207