STATE OF MICHIGAN

IN THE COURT OF APPEALS

Peter J. Hammer,

Plaintiff,

vs.

Board of Regents of the University of Michigan,

Defendant

Court of Appeals 272801

Lower Court No. 04-241 MK
Hon. James R. Giddings

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BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Defendant has described at length what it has done to date but fails to describe the basis for this Court asserting jurisdiction over this matter on an interlocutory basis. Defendant's Application for Leave to Appeal is devoid of any statement of facts to support an interlocutory application. Defendant is required to set forth the facts that will show that it will suffer substantial harm if it is required to await the final outcome of a trial. It has failed to do so and has failed to cite the court rule under statement of jurisdiction to demonstrate it has complied in any fashion with that requirement. Under Administrative Order 2004-5 the Defendant is required to comply with MCR 7.205 if the Application for Leave to Appeal is interlocutory in nature. In the instant action this is an interlocutory application for leave to appeal. MCR 7.205 requires that the Defendant provide the factual basis for the assertion that it will suffer substantial harm if it forced to proceed to trial rather than having the Court consider its appeal on an interlocutory basis. It is failed to do this.

RESTATEMENT OF QUESTIONS INVOLVED

1. Did the Court of Claims commit reversible error in denying summary disposition of Plaintiff's claim that he was denied tenure and terminated at least in part because of his sexual orientation contrary to repeated pre-employment representations, a University wide policy, and the communication of the proscriptions of a City Ordinance that barred such conduct?

   Plaintiff-Appellee answers "No."

   The Court of Claims answered "No."

   Defendant-Appellant believes the answer to be "Yes."

2. Did the Court of Claims commit reversible error in finding that material issues of fact existed such that summary disposition was improper with respect to whether or not Plaintiff's sexual orientation was one of the reasons that made a difference in the termination of his employment through the denial of tenure?

   Plaintiff-Appellee answers "No."

   The Court of Claims answered "No."

   Defendant-Appellant believes the answer to be "Yes."

3. Did the Court of Claims commit error requiring reversal of its denial of summary disposition by refusing to strike Plaintiff's affidavits in opposition to Defendant's Motion for Summary Disposition and in opposition to Defendant's Motion for Reconsideration?

   Plaintiff-Appellee answers "No."
   The Court of Claims answered "No."
   Defendant-Appellant believes the answer to be "Yes."

4. Did the Court of Claims commit reversible error by denying summary disposition of Plaintiff's claim of promissory estoppel as a means to enforce the pre-employment promise of nondiscrimination?

   Plaintiff-Appellee answers "No."
   The Court of Claims answered "No."
   Defendant-Appellant believes the answer to be "Yes."

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Clark Deposition

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Schneider Deposition

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2 email from Friedman to OSU colleagues regarding Hammer

3 Letter to Hammer from Lehman February 28, 2000

4 email string between Lehan and Hammer Summer, 2000

5 Report of Tenure Committee, 2002

6 Separate report on tenure by J.J. White, 2002

7 Separate report on tenure by Deborah Malamud, 2002

8 Minutes of February 11, 2002 Tenured Faculty Meeting

9 email string between Caminker and Malamud, February, 2002

10 email string between Lehan and Caminker and Hammer, May 2002

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21 Publication titled *The Future of Family Law*

22 Selected Bibliography of Schneider publications

23 Critiques of Hammer’s work by Kauper

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25 Article by Clark in Ave Maria Law Review, 2003

26 Proceedings of Board of Regents, July, 2003

27 Letter from counsel to Krislov, January 14, 2003

Appendix B (Exhibits to Brief in Opposition to Motion for Summary Disposition 6/1/06)

Affidavit of Peter Hammer dated March 7, 2006

Affidavit of Francis H. Miller

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Appendix C (Appellee's Brief in Opposition to Application for Leave to Appeal (July 11, 2006)

A. STANDARD OF REVIEW

The Court of Appeals reviews summary disposition rulings *de novo* to see whether the moving party is entitled to judgment as a matter of law. *Mitan v Campbell*, 474 Mich 21, 706 NW2d 420 (2005). Plaintiff agrees that the Court of Appeals reviews motions to strike affidavits to see whether there was an abuse of discretion. In addition, the Court of Appeals reviews applications for leave to file an interlocutory appeal to ascertain whether the applicant demonstrates, by recitation of facts, the reason why applicant would suffer harm at having to await the final outcome of trial before appealing. MCR 7.205(B)(1).

B. INTRODUCTION AND PROCEDURAL POSTURE OF THE CASE

After being terminated from his employment at the defendant law school, Peter Hammer filed suit in the Court of Claims on three contract theories challenging the legal basis for the actions of the defendant. The manner of handling this sensitive career-related dispute by the University of Michigan Law School is a tutorial in delay, deception and disregard of court imposed restrictions on the disclosure of information. This defendant has delayed producing the most obvious discovery materials, has countenanced perjurious testimony by its faculty with a wink and a nod, has misrepresented the contents of documents as well as the content of deposition transcripts and now seeks leave to appeal from an order granting in part and denying in part its motion for summary disposition, after rehearing.

During discovery, Defendant refused to provide even the most basic discovery materials concerning the tenure process until it had a protective order in place. It then refused to disclose certain tenure review documents because it asserted a self-created privilege. It ultimately backed off of this claim of privilege after conferring with a court designated pre-motion facilitator (a recently retired circuit judge). It then arbitrarily decided to limit the number of depositions plaintiff could take without court sanction. It took court action by Hammer to obtain the depositions of the decision makers, which were numerous due to the nature of the decision being challenged - tenure denial. Defendant went so far as to refuse to disclose the identity of a client that was being represented by one of its faculty, asserting that the client's identity fell within attorney/client privilege despite the fact that the litigation in which the client was being represented was a matter of public record for all of the world to see. After further delays, it relented on this feckless position as well.

This defendant now files it's application for leave to appeal asserting that it will suffer irreparably if forced to proceed to trial before an appellate review of these matters, but nowhere describes what that harm is. While it cites the language of the rule, it concludes that harm will naturally flow from being required to now proceed to trial. (Defendant's Application for Leave to Appeal @ pp. 3-4) It recites not a single fact upon which this conclusion is premised, contrary to the clear mandate of the rule: "*. . . and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal; . . .*" MCR 7.205(B)(1).

The only unusual aspect of this case is the fact that the defendant is a prestigious law school that does not permit internal review of its tenure decisions, does not harbor the same open and available grievance policies as its parent University, protects faculty who openly perjure themselves, harbors homophobic faculty and permits them to openly express their views and fails to keep its commitments to new faculty who accept tenure track positions based upon those commitments, only to find the law school is a closed society.

Defendant has demonstrated the same sense of self-entitlement in this court as it demonstrated throughout the discovery in this case - the same sense of self-entitlement that resulted in its filling a motion for summary disposition in the lower court replete with references to the content of protected materials, without filing the same under seal. Plaintiff does not complain of the openness of these proceedings, but points this out to further demonstrate that the defendant seems to make up its own rules and then chooses whether it will play by those rules without regard to its obligations.

Upon the close of discovery, defendant filed a motion for summary disposition. Plaintiff responded, and because there was a studied effort by defendant to distort the testimony of Peter Hammer, Hammer submitted a narrative affidavit in which he recited that he was competent to testify to the matters set forth and that he had personal knowledge thereof. In addition, extensive exhibits from discovery as well as transcripts of deposition testimony and other documentary evidence were submitted by Hammer. Two (2) days prior to hearing, defendant filed a motion to strike Hammer's affidavit, service of the same being received by counsel the day before hearing. The filing and service of this motion was improper and not in accordance with MCR 2.119(C)(1), which

requires seven (7) days' notice at a minimum, unless leave of court is granted to shorten the time. No leave was sought nor granted.

The day following service of the motion, a hearing on the summary disposition motion was held. At the outset, the court observed that the defendant had engaged in improper motion practice respecting the filing of the motion to strike and another feckless motion likewise untimely filed and noticed by the defendant, and admonished defendant for the same. It then denied the motion without argument as being lacking in merit. (Transcript of March 16, 2006 hearing at page 4) The trial court then heard the motion for summary disposition and denied it as well.

Thereafter, defendant filed a motion for a stay of proceedings. At that hearing, the court indicated it was not going to rule on the motion before it, however, in light of a bench conference held with the attorneys, the court was "willing to consider a belated motion for reconsideration . . .." (Transcript of hearing on July 27, 2006 at page 4) When defendant filed such a motion, it misrepresented the nature of proceedings that lead to it, namely, it indicated that the trial court had requested it file a motion for reconsideration. The trial court again had to make sure the record was free from misrepresentation and felt compelled to straighten out this misstatement on the record. (Id @ pp 3-4)

Hammer responded to defendant's motion for reconsideration filing an extensive brief (50 pages) with nearly 1,000 pages of exhibits attached. Defendant filed a reply brief and another motion, this one seeking to have the court disregard or strike certain affidavits as well as certain exhibits that were appended to Plaintiff's latest reply brief. The court denied this motion as being without merit. While defendant has asserted that

the court in doing so ". . . conceded [the affidavits] were replete with inadmissible hearsay and conclusory and incompetent statements lacking foundation," (Defendant's application at page 3) it is yet another misrepresentation to the court this defendant persists in making. Instead the trial court indicated that Hammer's impressions, opinions and visceral reactions would not be admissible however, the court refused to quantify how much of the affidavit that consisted of. (Transcript of July 27, 2006 at pages 5 and 6) While part of the motion to strike or disregard was premised on defendant's assertion that Hammer was required to file the same brief and exhibits he had filed initially, defendant's motion for reconsideration was almost twice the length of its original motion. Moreover, the court indicated it was the court's impression that it had invited Hammer's counsel to further address the essence of the claims and the documentation. And so, the court again had to make sure the record was accurate and free from defendant's repeated attempts to distort the procedural posture of the case. (Transcript of July 27, 2006 hearing at page 6)

On the motion for reconsideration, the trial court again denied the motion as to the "reasonable expectations" claims and "estoppel" claim, but this time granted the motion as to the *de facto* tenure claim. Defendant now seeks leave to appeal. Hammer stands ready to try this case.

C. STATEMENT OF FACTS[1]

Peter Hammer, after graduating from Gonzaga University, *summa cum laude* with a Bachelor of Science in Mathematics, a Bachelor of Arts in Economics and a Bachelor of Arts in Speech Communications awarded in 1986, attended the University of Michigan Law School on a combined degree program. He received his Jjuris Doctorate degree, *magna cum laude* in May of 1990 following which he clerked for the Honorable Alfred T. Goodwin in the United States of Court of Appeals for the Ninth Circuit and completed his PhD in economics, which was awarded in 1993. Thereafter, Hammer began work as a litigation associate in O'Melveney and Meyers, a Los Angeles, California law firm, and remained employed there until May of 1995 at which time he was hired by the University of Michigan Law School. At the time he accepted the position with the University of Michigan he was being recruited for other positions at prestigious law schools and was seriously contemplating accepting an offer from UCLA and the Georgetown Law Center. (Appendix B; Hause Affidavit)

Plaintiff is a gay, white male who has a Cambodian domestic partner and an extended family consisting of his partner's siblings and their children. This partnership extends back to 1991 and is continuing as of the date of this brief. Peter Hammer, who remained closeted throughout his school years at the University of Michigan and closeted throughout his interview process at the University of Michigan and elsewhere had a great deal of concern that his domestic partner would receive medical coverage

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[1]Where a reference is provided at the end of a paragraph that reference is the source for the entire paragraph.

were he to accept employment at any of the institutions recruiting him. In addition, because of plaintiff's awareness of the mistreatment of gay and lesbian students and faculty both at the University of Michigan and elsewhere Plaintiff was closeted until such time as he received an offer. He wanted assurances that if he accepted any particular offer that he would be treated fairly in the tenure process and that his sexual orientation would not be used as a basis to deny him tenure. As a result, after being offered employment at the University of Michigan he for the first time disclosed his sexual orientation to the Associate Dean for Academic Affairs (Kent Sevyrud) and the head of the Personnel and Recruitment Committee for the law school (J. B. White–not to be confused with J. J. White who will be discussed later). Upon revealing the same, both individuals not only assured him that his sexual orientation would not come into play in the way he was treated in those regards but also assured him that the By-Laws of the University prohibited such discrimination as did the Ordinances of the City of Ann Arbor, attaching evidence both to pre-employment correspondence with the plaintiff. Based on these assurances and plaintiff's reasonable expectations arising therefrom that he would not be the victim of discrimination in tenure decisions and that his partner would be provided coverage under his insurance policy Plaintiff accepted the offer of employment and became a tenure track professor at the University of Michigan in May of 1995. (Appendix B, Hammer Affidavit and Exhibit 1)

Plaintiff undertook his responsibilities at the University of Michigan Law School in an exemplary fashion. His teaching and service to the University have been described as "universally regarded as terrific" and "exemplary and extraordinary" by, ironically, one of the persons who voted against tenure. (Appendix B, Exh. 2) During the few years

following his hire he won two teaching awards, awards that were denied to individuals who voted against tenure for him. In November of 1997 he was notified that he was eligible for a mid-sabbatical leave in the Fall of 1998 and for a sabbatical leave in the Fall of 2001. (Appendix B, Exh. 7) These were not leaves that were provided as a matter of grace by Defendant as Dean Lehman has asserted, but were rather leaves that were earned by Plaintiff in accordance with the University's policies and were meted out to him no differently than anyone else. (Appendix B; Exhibit 25) In addition, Plaintiff received a Robert Wood Johnson grant which provided his salary during a period in which he did research and wrote pursuant to the grant. This grant is an extremely prestigious award and is one that reflects the quality of his work. (Appendix B, Hammer Affidavit)

In February, 2000 Plaintiff went up for tenure and at the conclusion of the tenure process the decision of whether or not to grant or deny tenure was deferred for a two year period. Plaintiff, a gay, white male and two women, one previously and one currently employed by the University, are the only individuals of record who ever had their tenure decisions deferred in this fashion. (Transcript of hearing July 27, 2006)

There are two methods of obtaining tenure at the University. If you are hired on a tenure track and promoted to tenure, a committee of your peers evaluates your teaching, service and scholarship and makes a recommendation to the Tenured Faculty. Internal and external reviews of your work are collected and the tenured faculty in a secret meeting, vote whether to grant tenure or not. A two-thirds vote in favor is required for tenure. After Plaintiff's tenure was deferred he worked diligently to produce additional writings for consideration and in 2002 went up for tenure again. Contrary to

Defendant's assertions Plaintiff has never been told why he was deferred tenure in 2000 and denied tenure in 2002 until this lawsuit was filed. To the contrary, documents attached to Plaintiff's trial court briefs demonstrate an effort to conceal those reasons from Hammer. (Appendix B, Hammer Affidavit)

When Plaintiff went up for tenure in 2002 the Committee formed to recommend for or against tenure voted in favor of tenure by vote of four to one, with J. J. White being the sole dissenter. When external reviews were sought, only one of a number of external reviewers recommended against tenure and that was based on a limited reading of two articles Plaintiff had written without regard to the balance of Plaintiff's scholarship. (Appendix B; Exhibit 18) Even that recommendation was conditioned on the assumption that what had been read by that reviewer was typical of the rest of Hammer's work.

In February of 2002 a secret meeting was held of the Tenured Faculty and by a vote of 18 in favor and 12 opposed, Plaintiff was denied tenure. By vote of the Tenured Faculty he was to be terminated at the end of the following academic year. (Appendix B; Exhibit 8)

Defendant contests the numbers and asserts that the vote was actually 18 in favor and 14 opposed indicating that there were two abstentions in addition to 12 "no" votes. This is contrary to the minutes maintained by the Dean's secretary and is contrary to the deposition testimony of each of the individuals deposed. Not a single decision maker testified to having abstained from voting. As of the time of the vote, Plaintiff had won two teaching awards, received various honors including a Robert Wood Johnson Health Policy Investigation Award, had 15 publications and works in

progress as well as three other publications and had made 22 presentations at various antitrust law sections, universities and foundations, seven other presentations at the University of Michigan and the University of Phnom Phen and six other professional and service affiliations all of which had demanded considerable time. (Appendix B, Hammer Affidavit)

Following the vote, Hammer attempted to ascertain the basis for the vote but was denied access to any information at the instruction of the Dean's office. All faculty were prohibited from revealing to Hammer the basis for their votes. (Appendix B, Exhibit 9; Caminker @ 74-80) Hammer attempted to file a grievance challenging the basis for the denial of the tenure and challenging the refusal to provide him with even the most rudimentary documents respecting the tenure process and was denied access to that machinery. (Appendix B, Hause Affidavit; Exhibit 15) There has never been a grievance review of the decision made by the faculty or of the denial to Hammer of access to information despite his efforts to invoke that process. This lack of reviewability of tenure issues has been described by the Associate Provost as a process limited to the Law School and one that was in conflict with the University-wide policy (Frumpkin at pp. 8-11).

Hammer was concerned that his sexual orientation may have been a factor in the denial of tenure. He had previously found himself socially ostracized by his peers. When he attended faculty functions such as picnics and the like with his family members they were excluded from interaction with the bulk of the faculty in attendance. Despite his efforts to participate he was treated more as a bystander or unwelcome guest than as a peer. One faculty member who had met Hammer and his partner on other

occasions repeatedly asked Hammer how his “wife” was. Another senior faculty member repeatedly asked Hammer what his children called him. Hammer heard remarks from a table at which tenured faculty members sat (including Friedman and J. J. White) in the faculty lounge to the effect that one had to be a homosexual or Israeli to get hired at the law school and that there should be an affirmative action program for straight faculty members. No one at the table took offense at the remark. Hammer also heard remarks concerning a lesbian couple that had been artificially inseminated about the use of a turkey baster in the process. Again the same professors were present and all seemed to be amused by the remark. Nobody was offended by it. Plaintiff was in attendance when James Hathaway, an openly gay professor, was disparaged in his professional capacity and not considered a serious scholar. (Appendix B, Hause Affidavit)

In addition to the foregoing, Plaintiff had heard from openly gay members of faculty who had been closeted at the time they were tenured and who had come out subsequently, concerning the history of the law school. Plaintiff was familiar with it because of his prior attendance and Plaintiff was familiar with the individuals that were listed on the masthead of the Law Review as being faculty members over the last several decades. Using the information provided from existing faculty members and the University’s publications Plaintiff was able to piece together an unenviable record when it comes to gay faculty members. (Appendix B, Hammer Affidavit)

In addition to David Chambers’ career having been sidetracked once he came out, Rob Precht was asked to leave an Assistant Dean’s position after a group critique of his performance. The head of that committee was the same J. J. White who

dissented from the tenure recommendation in Hammer's case. (Appendix B, Hammer Affidavit) What Hammer observed and what he was told by employees of the Defendant concerning the treatment of gay and lesbian members of faculty was consistent with the report generated by the University itself on April 23, 2004 and attached to Appendix B as Exhibit 29. Plaintiff attempted to appeal the denial of tenure to the Provost in accordance with the policies of the University asking the Provost to review the decision. (Appendix B; Exhibit 11; Courant Dep. @ pp 30-33) The Provost claimed to have reviewed the decision and found that the process used in denying Hammer tenure was appropriate. The Provost denied doing a substantive review of Hammer's tenure decision. Nonetheless, the Provost told at least one Associate Dean, Chris Whitman, in the Spring of 2002, shortly after the denial of tenure, that it didn't matter what the faculty vote was, he, Paul Courant, was going to deny tenure to the Plaintiff. (Appendix B, Exhibit 32) The only person on faculty from whom Courant had any input, according to Courant and according to Lehman, was Jeff Lehman who had subsequently been condemned as homophobic when he was the President of Cornell University. (Appendix B; Lehman Dep. @ 30-31)

Based upon the reasonable expectations Hammer formed as a result of the assurances given by Sevryd and J. B. White and as a result of the written materials provided to him, he brought an action based upon such reasonable expectations asserting that he was terminated for a cause (sexual orientation) that he had been led to believe would not form a basis for consideration regarding tenure.

In addition, Plaintiff forbore from accepting employment at two other institutions which would have provided him with discriminatory free review at the time of tenure and

would have provided his partner with appropriate medical insurance. As a result of the Defendant's commitments made to him during the pre-employment negotiations, made with every expectation that Plaintiff would rely on them, Plaintiff accepted employment at U of M. (Appendix B, Hammer Affidavit) Plaintiff brought a second claim asserting that even if the representations were insufficient to be enforceable as a matter of contract under *Toussaint* and its progeny, that the Defendant should be estopped from denying the validity of such a commitment. The third claim Plaintitff asserted was as well as a contract claim and Plaintiff believes improvidently dismissed so however Plaintiff does not believe that interlocutory relief is appropriate since a trial on the merits of the remaining claims could well moot the need to appeal on the dismissal of the *de facto* tenure claim.

ARGUMENT

Preface

The Application for Leave to Appeal filed by the Defendant in this cause is best described as an attempt to mimic a child's game of "let's pretend". Defendant has asserted facts that are not evidenced by the record. Defendant has attributed theories of the case to Plaintiff that are not borne out by any of Plaintiff's filings or pleadings in this case. Defendant has fabricated statements ostensibly evidenced by reference to deposition transcripts when such references do not bear out the statement posed by Defendant. (Appendix B, Brief at pp 2 and 3) The most subversive practice Defendant has engaged in is the practice of purportedly describing Plaintiff's position in the Court below indicating that Plaintiff premised a legal argument on some narrow assertion of

fact when such was not the case. In order to respond, pages of argument would be consumed as to each such false assertion. In that fashion, Defendant could render it virtually impossible for Plaintiff to respond adequately to the legal arguments posed. The legal arguments posed really apply to the "pretend" facts and not the actual facts of this case. In addition, Defendant makes false assertions and cites nowhere in the record where such assertions can be found. The long and short of it is that while Plaintiff will respond to some degree in this brief, Plaintiff is limited to 35 pages and therefore urges the Court to review carefully Plaintiff's Second Brief In Opposition to Defendant's Motion for Summary Judgment contained in Appendix B for reason that that brief (some 50 pages in length and containing 47 attachments exceeding 1000 pages in length) sets forth in great detail the legal theory of Plaintiff's claims and the factual basis therefore. Defendant's description in its Application is misleading, fictitious, and truly a game of "let's pretend".

I. THE TRIAL COURT PROPERLY FOUND THAT IN THE CONTEXT OF PRE-EMPLOYMENT NEGOTIATIONS, THE PROMISE TO BE FREE FROM DISCRIMINATION BASED UPON SEXUAL ORIENTATION IN AMONG OTHER THINGS THE AVAILABILITY OF INSURANCE FOR A SAME SEX PARTNER AS WELL AS THE TENURE AND REVIEW PROCESS INVOLVING THE ULTIMATE DECISION OF RETENTION, WAS AN ENFORCEABLE COMMITMENT UNDER PREVAILING MICHIGAN LAW.

In reading the Defendant's application it is almost as though someone gave directions to find cases ruling against the Plaintiff and then made up facts that fit into those cases pretending that they were the facts in of the instant case. By way of example, Plaintiff's Complaint does not make reference to a faculty handbook as a basis

for his claim. Plaintiff's Briefs in Opposition to Motion for Summary Disposition do not make reference to an employee handbook as a basis for his claim. Defendant nonetheless argues that Plaintiff's claim is premised upon a policy contained in a handbook. It is done so that it could cite handbook cases to this Court, which have scrutinized certain deficiencies in certain discrete cases. None of them have any applicability to the case at bar. The Defendant miscasts Plaintiff's claims in this action in such a manner as to attempt to make them more vulnerable. Nonetheless, in this case, there are certain facts that are undisputed on the record. Defendant did not dispute these facts below and does not dispute these facts here.

Peter Hammer, after having been offered employment at the University of Michigan Law School at a time when he was being sought for employment by other prestigious law schools in the country, sought certain assurances from the Defendant prior to determining whether not he would accept its offer of employment. Plaintiff, who has a domestic partner, was concerned that his domestic partner would be covered by medical insurance at whatever school he accepted employment. Plaintiff, understanding that he was accepting a long range probationary period as a tenure track professor which ended in permanent employment or termination, sought assurances that he would not be discriminated against on the basis of his sexual orientation in the ultimate decision to retain or terminate his employment. Plaintiff and Defendant were well-aware that at some point in time Plaintiff would be considered for tenure (employment that is terminable only for cause) and he wanted to be free from discrimination in that process. Both parties were well-aware that the failure to grant tenure would likely result in termination from employment and in this case it did.

Plaintiff sought and received assurances from J. B. White, the head of the Recruitment and Personnel Committee at the Law School that made the offer of employment to him and sought further assurances from Kent Sevyrud, the Associate Dean for Academic Affairs. Not only did Plaintiff receive oral assurances from each of those individuals that he would be free from such discrimination based upon his sexual orientation, but in addition Sevyrud sent to the Plaintiff a letter assuring him of the same as well as a letter from Jackie McClain, then Vice President of Human Resources and a copy of the Ann Arbor City ordinance protecting individuals from discrimination based upon sexual orientation. All of this was intended to and did create in Hammer's mind the feeling that the University was committing to him not to discriminate on the basis of his sexual orientation and to pass upon his qualifications for tenure without regard to his sexual orientation.

The Plaintiff, upon being denied tenure, attempted to grieve that decision and was denied access to the grievance mechanisms at the law school for reason that the law school had newly adopted a grievance policy that prohibited the filing of a grievance having anything whatsoever to do with the decision on tenure, a policy that was drafted by Friedman, who spoke out against tenure for Hammer. So extreme was this measure that even the request for documents that may have been discoverable under the Bullard Plawecki Employee's Right to Know Act was denied review in the grievance process for reason that the documents somehow were tangential to the tenure decision.

Defendant now argues that neither J. B. White nor Kent Sevyrud or Jackie McClain had authority to give the assurances upon which Hammer relied. Nowhere in any of the filings below or in this Court is there any evidentiary basis for the assertion

that J. B. White, Kent Sevyrud and Jackie McClain lacked the authority to make the commitments made to the Plaintiff that he would be free from discrimination based upon sexual orientation. To the contrary, the By-Law that gave rise to these assurances was adopted by the Board of Regents, unlike all of the case law cited by the Defendant in an attempt to assert that the actions of these individuals was *ultra vires.*

Peter Hammer's sexual orientation is at the core of all of the issues in this case. Peter Hammer attended the University of Michigan Law School graduating *Magna Cum Laude* in May of 1990. During his years as a student his sexual orientation remained private (closeted) to those at the law school. When Peter Hammer attended the nationwide recruiting conference for law professors he had remained closeted. When he was invited to interview for employment at the University of Michigan law school, he remained closeted. When he interviewed with the faculty committee at the University of Law School he remained closeted. Peter Hammer was well aware of the potential impact his sexual orientation would have on his ability to gain employment in academia. He made a conscious decision to remain closeted until a viable offer was made. At that point, he was well aware that he would have to disclose his sexual orientation for reason that it was imperative to him that his same sex partner be covered under his medical insurance.

At the time Hammer was negotiating with U of M, he was also negotiating with several other universities and two in particular had indicated a desire to have him on faculty and accommodate his insurance needs. Those universities did not provide insurance benefits for same sex partners, but the Universities had committed undertake to find employment thereat for Plaintiff's partner so that Plaintiff's partner would be

covered under each University's medical insurance policies. Having attended college at the University of Michigan Law School, Plaintiff was well aware of its environment and sought assurances from both Sevyrud and J. B. White that his sexual orientation would not be a problem and in particular, would not deter from his efforts to gain tenure (employment terminable only for cause) at the law school. While Defendant in its application and briefs below ignores the fact that the tenure decision is a decision of retention or termination, Hammer at no time ignored that fact nor did the tenured faculty who, upon denial of tenure, directed the dean to offer a terminal year of employment.

Defendant briefs at length cases in which the courts in Michigan have refused to apply the reasonable expectations doctrine to assurances other than those of continued employment except for cause. In doing so, it ignores the fact that the aspect of the Plaintiff's reasonable expectations that he seeks to enforce in this case is in fact the termination of employment by the University because of upon his sexual orientation, and thus cases dealing with other issues are inapposite. This is not a promotion claim. It is not an insurance claim. It is not an hostile environment claim. It is a claim that Plaintiff was terminated for reasons that he was assured would not be considered.

Plaintiff's claim is premised upon pre-employment commitments made by the head of the Defendant's Personnel Committee and the Associate Dean for Academic Affairs at the law school, as well as the by-law of the University of Michigan as embodied in the correspondence from its Human Resources Department. Defendant does not contest that such By-Law exists and remains unchanged to this day.

While Defendant cites to the Court several cases in which it was held that because the Board of Trustees or Board of Regents at various universities were the sole

contracting powers that could extend an offer of tenure, that an individual at the University making such an offer did so *ultra vires,* it has not offered any evidence whatsoever from which a court could determine that the head of the Personnel Committee and the Associate Dean for Academic Affairs lacked the authority to make the commitments that were extended to the Plaintiff. In the case at bar there is no claim that either White or Sevyrud extended an offer of tenure to the Plaintiff and there is no effort to enforce such a promise. It would be indeed ironic if the Court were to find that the individual administrative members of the University of Michigan lacked authority to enforce the By-Laws of the University of Michigan.

Returning then to the case that <u>is</u> in issue, the issue is whether or not pre-employment promises of nondiscrimination in, among other things, the decision whether or not to terminate Plaintiff's employment, are enforceable where the same created a reasonable expectation that the employer was limiting its power to terminate. An employer in Michigan is always free to limit the basis upon which it can terminate an employee. Indeed, that is the underlying philosophy of *Toussaint* and its progeny. *Thomas v. John Deere Corp.*, 205 Mich App 91, 93-94; 517 NW2d 265 (1994)

The lower court's task in the case at bar was to determine whether or not the promises that were made by Sevyrud and J. B. White were ". . . reasonable capable of instilling a legitimate expectation of just cause employment." *Rood v General Dynamics Corp*, 444 Mich 107, 138-139, 507 NW2d 591 (1993). In this case, Plaintiff's sexual orientation was not to be considered a cause for termination. While it is conceded that not all policy statements rise to the level of a promise, in *Rood* the Supreme Court recognized as enforceable a ". . . manifestation of intention to act or refrain from acting

in a specified way, so made as to justify a promisee in understanding that a commitment had been made." Id. at 138-139. Here, Defendant does not argue that a commitment was not made, but simply argues that it does not have to live up to such commitment. In the case at bar, of course, the commitment that was made was consistent with the published By-Laws of the University of Michigan and with the City Ordinances of the City of Ann Arbor, which were forwarded to the Plaintiff as further evidence of the commitment the University was making to him were he to accept employment thereat. (Appendix B, Exh. 1)

While Defendant cites series of cases in which this Court and the Supreme Court have refused to apply the *Toussaint* doctrine, it cites not a single case to this Court that holds that an employer can promise to limit the basis upon which it terminates an employee in order to hire the employee without creating an enforceable right on the part of the employee. In the case at bar it is no different that the employer committed not to allow Plaintiff's sexual orientation to, among other things, taint the tenure decision (which is the decision whether to terminate Plaintiff or not) than an employer committing to terminate employees only for stated grounds such as habitual drunkenness, tardiness, fighting and the like. While Defendant attempts to portray this as a case involving a commitment dealing with conditions other than termination, such is not the case.

Plaintiff was denied tenure and on that basis was given his terminal year of employment, according to Defendant. The vote to deny tenure was in essence a vote to terminate employment in the academic year following the vote. Indeed, the minutes of the meetings so reflect in that the faculty required the offer of a terminal year contract,

thus setting the date upon which Plaintiff's employment at the University of Michigan Law School would be terminated.

An employer is free to enter into an arrangement or an agreement with an employee to bind itself to whatever termination provisions they wish. *Thomas v. John Deere Corp.*, 205 Mich App 91, 93-94; 517 NW2d 265 (1994). In the case at bar the University of Michigan Law School did exactly that. It agreed to bind itself to a termination provision (the ultimate tenure decision) which proscribed its consideration of Plaintiff's sexual orientation as a factor. This is consistent with the ultimate holding in *Toussaint v. Blue Cross Blue Shield, 408 Mich 578 292 NW2d 880 (1980)* and was most recently relied in *Daimler Chrysler Corp. v. Carson*, 203 Mich App Lexis 576 decided March 6, 2003, an unpublished opinion of the Court of Appeals.

Defendant relies in part for its position on *Mack v. City of Detroit*, 467 Mich 186, 649 NW2d 47 (2002) asserting that it requires Plaintiff to look to the University for any relief even though the University prohibits the filing of a grievance based upon a tenure issue. Its reliance on *Mack* is inappropriately placed. *Mack* stands for the proposition that a city may not pass an ordinance creating a cause of action for sexual orientation discrimination against among other things the city itself when the state's governmental immunity statute prohibits such claims. In the case at bar Plaintiff's claim is one for breach of contract and has been filed in the Court of Claims. No immunity problem exists with respect to Plaintiff's claim here. Moreover, no immunity problem was raised in the lower court as a basis for dismissal. For the foregoing reasons, Plaintiff has demonstrated a *prima facie* case, indeed an unrebutted case that the policies, By-Laws, representations and promises of the University that Plaintiff's sexual orientation would

not be an adverse factor in the decision whether to retain him by granting him tenure exists. Defendant has made no effort whatsoever to undercut the factual assertion of Plaintiff's claim. Under the standards cited to the Court and relied upon by both parties as set forth by the Supreme Court in *Rood v. General Dynamics Corp*., 444 Mich 107, 507 NW2d 591 (1993), the Court properly found based upon the quantum of evidence offered by the Plaintiff that summary disposition was inappropriate.

II. THE TRIAL COURT CORRECTLY FOUND THAT MATERIAL ISSUES OF FACT, EXISTED REGARDING WHETHER PLAINTIFF'S SEXUAL ORIENTATION WAS A REASON FOR HIS TENURE DENIAL AND TERMINATION.

A. Direct Evidence of Discriminatory Animus

In keeping with Defendant's game of "let's pretend" Defendant has asked the Court to pretend there is no direct evidence of discrimination and therefore invites the Court to apply a *McDonnell Douglas* analysis to this case. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1887 (1973) In analyzing the issue, however, Defendant fails to cite to this Court perhaps the lead Michiga case on direct evidence, *Harrison v Olde Financial Corp,* 225 Mich App 601 572 NW2d 679 (1997), decided by Justice Young (then sitting on the Court of Appeals) and joined in by Justice Taylor, (also then sitting on the Court of Appeals). There, Justice Young observed

> "Federal case law holds, and we agree, that the *McDonnell Douglas* evidentiary framework does not apply when a plaintiff presents direct evidence of discriminatory animus. (Citations omitted). 'Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] Defendant's discriminatory intent' (citation omitted).

> 'Direct evidence' has been defined in the Sixth Circuit Court of Appeals as evidence that, if believed, ""requires the conclusions that unlawful discrimination was at least a motivating factor"" (citation omitted) For example, racial slurs by a decision maker constitute direct evidence of racial discrimination that is ""sufficient to get the Plaintiff's case to the jury."" " (citation omitted) at 609-610. (emphasis added)

After observing that direct evidence of discrimination vitiates the need for a *McDonnell Douglas* analysis because the Plaintiff no longer relies upon the inference that is built under *McDonnell Douglas*, Justice Young observed

> "In the instant case, Plaintiff testified in her deposition that the Defendant's employees made derogatory comments about her race. Because of Plaintiff's direct evidence of discrimination this case presents a question of mixed motives, one in which Defendant's decision not to hire Plaintiff could have been based on several factors, legitimate ones as well as legally impermissible ones. Id. at 610.

In the case at bar, there is direct evidence of the gay equivalent to racial slurs. William Miller (who voted against tenure) telling his students that the visage of two men kissing was disgusting is such a slur. Miller's reference to homosexuals as a "pariah group" and people of "low status" is the equivalent of a racial slur. Carl Schneider voted against tenure. Schneider's writing to the effect that homosexuals should not enjoy the same legal rights as heterosexuals is the equivalent of a racial slur. Kyle Logue voted against tenure. Logue's concealment of the fact that he teaches that homosexuality is an abomination and a sin against God is the equivalent of a racial slur. That he belongs to a church that bars membership by homosexuals is the equivalent of a racial slur. All of these individuals spoke out in the secret meeting at which the vote in question was taken and since none of the negative voters decided to vote against Hammer until that

meeting, one must assume, or at least a reasonable inference can be drawn from those facts, that the direct evidence of anti-gay animus influenced the vote of the faculty. That faculty members would sit around and joke laughingly about a lesbian couple using a turkey baster to artificially inseminate is the equivalent of a racial slur. That J. J. White and Richard Freidman were present and apparently enjoyed the joke is direct evidence of discriminatory animus. J. J. White was the sole dissenting member of the tenure committee and the only one to recommend against tenure for Hammer.

Contrary to Defendant's assertions Plaintiff produced a great deal of direct and circumstantial evidence in this case demonstrating that Hammer's sexual orientation was a factor in the tenure vote. In additional, Hammer produced a great deal of evidence demonstrating that faculty members who voted against him were less than forthright in answering questions concerning their motivation. Lastly, Hammer produced evidence that showed that most, if not all of the faculty who voted against tenure did so using a proscribed method of weighing the three factors to be considered for tenure under the University guidelines.

Beginning with the most overt direct evidence, William Miller admitted to using the visage of two men kissing as an example of a disgusting act. Contrary to the defendant's assertion that he did so in a book entitled "Disgust" – for which they do not cite to the record, he actually used this example in discussions. (Appendix B, Miller Deposition at pp 19-21). In a book he wrote titled "Faking It", he referred to homosexuals as a "pariah group" and a group of "low status." (Id. at 23-35) Had Miller told his students that the visage of two African American's kissing was disgusting, one suspects that not even this defendant would claim it did not evidence racial bigotry.

We then turn to Kyle Logue whose prejurious testimony is ignored by defendant. Logue wrote to Plaintiff complimenting him on his writings but voted against him at tenure time because of his writings. Logue lied under oath about not knowing whether the fundamentalist Baptist church to which he belonged opposed homosexuality. He testified that he did not hold any beliefs homosexuality was a sin against God or an abomination. He lied under oath about his own participation at that church indicating that he went on most Sundays. He denied under oath being able to recall the holding in *Roe v. Wade*. He lied under oath about whether he knew what the terms "Pro Life" and "Choice" meant in the context of abortion rights. On investigation, it turns out that the Church he attends condemns homosexuality as an abomination and sin against God. Homosexuals cannot join this church unless they agree to reform. Logue and his wife teach Sunday School at this Church and undoubtedly adhere to and teach the spiritual and religious precepts adhered to there. (Appendix B, Brief @ pp. 22-23; Huron Baptist Church Website, and Transcript of Private Investigation). Once again, if his church taught that being Black was an abomination, one would not question the racist quality of the statement.

Lehman was the then Dean at the law school. He at first denied ever being publicly accused of homophobia, but then admitted the same. Most telling about Lehman was his freely admitting that he would discriminate against African Americans and Gay and Lesbian faculty or students if it meant facilitating the receipt of money, as long as it was not illegal, in other words, irrespective of the morality of the position. Lehman lied about so many different aspects of Hammer's employment that his deposition was more like a chapter in "Alice in Wonderland". Lehman claimed to have

given Hammer an extra year to teach after his tenure denial, when the true facts were that Hammer had secured that extra year of employment two years earlier. Lehman claimed it was his idea in order to help Hammer. In truth, it was required by the Regents By-Laws and was mandated by the faculty vote taken in February 2002. Lehman freely admitted that he falsely titled a letter sent to the Provost respecting the tenure vote so as to avoid having to disclose its contents upon receipt of a Bullard- Plawecki Employee's Right to Know Act request. While much more could be said, because of the page constraints here, please refer to Appendix B, and its "Appendix on Credibility."

Friedman was the prime example of duplicity when it came to what his state of mind held at any given time. On the eve of the tenure meeting, he emailed Hammer wishing him luck, knowing he would need it because he, Friedman was secretly speaking out against tenure for Hammer. After the meeting at which Hammer was denied tenure, Friedman emailed him his condolences. Friedman tried to coerce Hammer into refraining from litigation. He subsequently wrote an email to colleagues at Ohio State in which he took a position at odds with what he told his UM colleagues, namely that Hammer would be a mover and a shaker and a leader in his area – all things he decried as lacking in Hammer's scholarship during the secret tenure meeting. (Appendix B, Friedman dep pp. 21-22 and Exhibit 2)

Sherman Clark testified that he held strong "Pro Choice" beliefs and yet had recently written an article for Ave Maria Law School strongly condemning such beliefs and expressing his person commitment to "Pro Life" beliefs. (Appendix B, Clark Dep. @18-19; Exhibit 25) This issue is frequently tied to issues respecting gay marriage. It is not so much Clark's holding "Pro Life" beliefs that is bothersome, but rather his

concealment of the same in the context of this lawsuit. If he did not believe the issues to be tied to one another, why then would he have attempted to conceal his position by perjuring himself?

Carl Schneider has repeatedly written articles advocating against equal marital rights for gay and lesbian couples. He did so most recently in 2005, not long before his deposition. Yet at his deposition, he claimed he had not thought through the issue and therefore did not want to give an opinion on it. This was a blatant lie. Again, it is not necessarily the position on a hot button topic that is significant, it is the deceit about the position and the willingness to lie under oath to conceal the position that is troubling. Schneider has opposed equal rights for gay and lesbian members of our community for decades. (Appendix B, Schneider Dep. @ p. 23 and Exhibits 21 and 22)

While other nay sayers are further discussed in the summary disposition briefs and attachments (Appendices A and B), enough has been said about them. However, one person bears further discussion. J. J. White was the lone dissenter on Hammer's tenure committee. His dissent formed the basis for several negative votes. His review of Hammer's work was unprofessional, according to a well experienced expert in the field of tenure reviews. (See Appendix B, Affidavit of Francis H. Miller) In looking at his prior relationship with people at the law school, we gain some insight. He was a close friend and mentor of James Martin, the first person to die of AIDS in Washtenaw County. Martin achieved tenure at the law school and thereafter "came out" revealing that he was gay. Upon his death, J. J. White wrote a memoriam for him in the law review. Rather than extolling his virtues; rather than speaking to the tragic nature and cause of his death; rather than writing anything of a personal nature about Martin, he

wrote a piece dealing with Martin's preoccupation with the misuse of punctuation. (Appendix B, Exhibit 17)

All of the negative voters testified that their decision to vote against tenure was made at that meeting. From this, one may infer that it was based upon what was said at that meeting; what was said by the likes of Kyle Logue, William Miller, Carl Schneider, Jeff Lehman, Sherman Clark , Rich Friedman and so on.

B. Circumstantial Evidence of Discriminatory Animus.

While Defendant has in the most benign way attempted to describe the atmosphere at the University of Michigan for gay and lesbian faculty members, that description is not at all based upon the evidence Plaintiff relied upon in the Court below nor is it evidence that the Court considered in passing upon the Motion for Summary Disposition for which Defendant now seeks interlocutory review.

To begin with, it is noteworthy that there is no evidence in the record to demonstrate that an openly gay law professor has ever been granted tenure by a secret vote of the tenured faculty in the modern history of the law school. (See Appendix B, Hammer Affidavit) Peter Hammer was the first openly gay law professor to be considered for tenure by secret vote of the faculty and they failed at their task. While several faculty members have been identified by the Defendant as being gay and tenured, those individuals provide no safe harbor for the Defendant. Professors Grey, Chambers, Martin and Fryer were all granted tenure prior to their coming out or revealing the fact that they were gay. Each of them was closeted until after tenure was granted. (Hammer Affidavit)

Chambers, who had been on track to become Dean of the Law School was side tracked once he came out. Martin, who passed away from AIDS, being the first in Washtenaw County to have succumbed to that disease, received an aloof "in memoriam" written by J. J. White, his alleged close friend. Defendant points to Professors Brody, Schacter and Hathaway as further examples of nondiscrimination each of them being gay and/or lesbian, however this too does not provide safe haven for the Defendants. Brody and Schacter were not hired by secret vote of the tenured faculty, but were rather outside hires provided tenure at the time of hire and were considered therefore and discussed by the entire faculty including clinical and non-tenured faculty. The latter includes women, minorities and gay and/or lesbian members. It is a much more open process. Moreover, neither was to be offered a permanent position until Hammer himself, a member of the hiring committee, lobbied the committee heavily to consider making a full-time offer to them. Brody and Schacter found the atmosphere in Ann Arbor unwelcoming and left as a result. (Appendix B; Hammer Affidavit)

Hathaway too was the beneficiary of Hammer's efforts to obtain an offer of employment. Hathaway as well was hired in the more open consideration given by the full faculty and not in a secret meeting by the tenured faculty. When Hathaway's deposition was taken, Hathaway was in Arizona where he resides for all but two months of the year. Hathaway's relationship with the University of Michigan Law School is such that he is paid an exorbitant amount for approximately eights weeks of teaching. The rest of the time he absents himself from Ann Arbor and from the teaching faculty which should tell all what his true beliefs about this campus are. He is paid $130,000.00 a

year, plus benefits, for the six to eight weeks of teaching per year that he conducts. (Appendix B; Hammer Affidavit) Not bad work if you can get it.

With respect to the atmosphere on campus for gay and lesbian students and faculty, the Defendant itself has published a report showing the unwelcoming nature of campus life (Appendix B, Exhibit 29). Consistent with that is Hammer's own observations and his own interactions with faculty. Contrary to the assertion by the Defendant that Plaintiff's evidence of an unwelcoming atmosphere was simply that there was a Burns Park mentality where people had to have children to fit in, Plaintiff described several events that were consistent with the University Study referenced above. Plaintiff described remarks made in the faculty lounge at a table at which J. J. White and Rich Freidman were present to the effect that one had to be gay or Israeli to get a job at the University of Michigan Law School. He also heard remarks related to Schacter and Brody who had a child through artificial insemination having to do with the pregnancy being induced by use of a turkey baster. When Hammer attended law school sponsored family functions such as picnics, he found himself excluded from the community in attendance. Hammer's Affidavit is replete with references to the manner in which gay and lesbian faculty were minimized. Even those who had been granted tenure at the University have either avoided being part of the University community (as has Hathaway) or have readily left the University at the first availability opportunity (as did Brody and Schacter). And so, Plaintiff produced ample circumstantial evidence of sexual orientation bias by those who opposed his tenure.

C. Incorrect Standard Used for Tenure Decisions.

One aspect of that meeting we do know, however, is that each of the individuals who voted against tenure did so based upon a standard that the University specifically rejects. Exhibit C to Defendant's Motion for Reconsideration (Defendant's Appendix A, Exh. C) provides that in deciding upon tenure, the faculty is to consider the teaching, service and scholarship of the applicant. Faculty are not supposed to grant or deny tenure on any one factor, but are to consider all factors as a whole. None of those voting against tenure did so and they all admit the same. Each indicated that in voting against tenure they did so based upon scholarship alone, while acknowledging Hammer's teaching and service to be superlative. Each maintained that there was an absolute level the applicant had to achieve in each category, weighed separately, before tenure was to be granted. This standard is prohibited by the University. Moreover, Hammer's scholarship was well viewed as was evidenced by his being awarded a Robert Woods Johnson grant – a very prestigious award acknowledged as such even by Carl Schneider.

The standard provides that its tenure recommendation ". . . ultimately rest not on three separate judgments but on an appraisal of the candidates achievements and performance in the three areas taken together."

D. The Court Correctly Refused to Grant Summary Disposition Where Credibility Issues and the Fact that the Motion for Summary Disposition was Premised Upon the State of Mind of the Defendant's Agent Were Evident.

In this case, each of the individuals who opposed tenure (a vocal minority) did so based upon a secret state of mind. The Court must bear in mind at all times that it was

a minority of the tenured faculty that prevented Plaintiff from achieving tenure.

Plaintiff describes the state of mind as being secret in light of the revelations about Logue who belongs to a church that does not permit membership by homosexuals and who teaches Sunday school thereat. That church condemns homosexuality as a sin against God. There were other examples as well and they are described *infra*. This Court has repeatedly held in passing upon motions for summary disposition that such motions are "especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial." *Vanguard Insurance Co. V. Bolt and Wargel*, 204 Mich App. 271, 275, 514 NW2d 525 (1994) (internal citations omitted). Furthermore, in passing upon a motion for summary disposition such as the one at bar the trial court is called upon to

> ". . . consider the pleadings, affidavits, depositions, admissions, and documentary evidence available to it and give the non-moving party the benefit of a every reasonable doubt. The motion must not be granted unless the Court is satisfied that it is impossible to support the claim at trial because of some deficiency which cannot be overcome."

Michigan National Bank Oakland v. Wheeling, 165 Mich App 738, 743-44, 419 NW2d 746 (1998). In the case at bar the Defendant has invited the trial court and now this Court to do quite the opposite. It requests the Court to determine credibility issues in its favor and requests that this Court make inferences in its favor and reject any potential inferences Plaintiff could muster based upon the evidence discussed above. The standard that Defendant requests this Court to apply is as tainted as that which was urged upon the trial court and this Court should not bestow the extraordinary remedy of an interlocutory appeal on the Defendant under these circumstances. Credibility issues

abound with each of the negative voters and were amply briefed in the trial court. Their state of mind was likewise in issue as evidenced by the flip flops done by Lehman, Friedman, Schneider, Logue and Clark. There is simply too much competing evidence.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE AFFIDAVITS AND EXHIBITS FILED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DEFENDANT'S MOTION FOR RECONSIDERATION INSTEAD CHOOSING TO DISREGARD ANY OBJECTIONABLE PORTIONS THEREOF AND CONSIDER THE NON-OBJECTIONABLE PORTIONS.

Defendant moved the lower court to strike Plaintiff's affidavit filed in opposition to the initial summary disposition motion. In doing so Defendant filed its motion two days in advance of hearing and Plaintiff's counsel was served the day before the hearing. This was a clear violation of MCR 2.119(C)(1) which requires a minimum of seven days notice. Moreover, contrary to the local practice the Defendant did not make arrangements with the Court to have such motion placed on the docket for the same day as the summary disposition motion was scheduled. The trial court chastised Defendant for the manner in which the motion was filed and nonetheless denied the motion without response from Plaintiff. At no time did the trial court refuse to allow Defendant to nonetheless argue that the affidavit was in any way unprobative of the issues. The remedy was not to strike the affidavit. The remedy for defendant was to argue that the affidavit was insufficient as the court considered the evidence before it. Defendant in choosing to file the motion in violation of the time restrictions under the Michigan Court Rules without seeking leave of Court to do so and noticing it for hearing contrary to the

local practice of the trial court cannot now be heard to complain that the judge abused its discretion in refusing to strike the motion under those circumstances.

When the parties rebriefed the issues and in particular when Defendant rebriefed the issue in its motion for reconsideration, Defendant's Statements of Facts nearly doubled in length. Defendant's brief initially was 20 pages in length and on reconsideration was almost twice that length. In response, Plaintiff added additional exhibits and additional affidavits. Rather than replying to the substance of these additional affidavits and additional exhibits Defendant simply sought to have the Court strike or disregard them. It asserted to the lower court that the parties were supposed to rebrief and refile the same issues as previously filed however, it did not limit its filing to that which it had said previously. Indeed, a motion for rehearing that simply recites that which was already before the court is improper under the rules. MCR 2.119(F)(3)

The Court upon consideration of the motion in question reflected that there were certain portions of Plaintiff's affidavit that it would not consider. It found them to be inadmissible for purposes of the motion for summary disposition insofar as it challenged the merits of the decision of the Defendant. That the Court did not strike those portions is of no moment inasmuch as the Court did not consider the inadmissible evidence in determining the motion for summary disposition. As a result, the position Defendant now takes is contrary to law and contrary to fact, the trial court having observed at the time of Defendant's objection that it expected that the plaintiff would devote more time to the legal and documentary evidence.

IV. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S

MOTION TO SUMMARILY DISMISS PLAINTIFF'S CLAIM FOR PROMISSORY ESTOPPEL WHERE THE FACTS SET FORTH BY PLAINTIFF WENT UNREBUTTED.

The Defendant moved to dismiss Plaintiff's claim for promissory estoppel which was pleaded in tandem with his claim of reasonable expectations. It is Plaintiff's theory of the case that if the promises that were made to induce his reliance did not form the basis for a claim for breach of reasonable expectations or contract, the Defendant should nonetheless be estopped from denying the enforceability of that commitment since at the time it was given the Defendant intended the Plaintiff rely on it and Plaintiff did rely on it to his detriment.

As discussed at length, Plaintiff was concerned about two aspects of his employment at the University of Michigan and potentially at other universities that were recruiting him simultaneously. Plaintiff for personal reasons was very concerned that his domestic partner would be covered by any medical insurance available from his potential employer. Further, Plaintiff was concerned that he would be considered based upon the merits of his teaching scholarship and service and not upon the basis of his sexual orientation when the ultimate tenure decision was made. Plaintiff received such assurances from three different universities, the Defendant university being one of them. Additionally, the two remaining potential employers had committed to finding employment for Plaintiff's domestic partner so that he would have the benefit of medical insurance.

Unlike the cases relied upon by the Defendant below, this is not a claim that is premised on the notion that Plaintiff simply gave up other gainful employment to accept employment at the University of Michigan. To the contrary this is a claim that Plaintiff

gave up employment where he would be free from sexual orientation discrimination on the premise that he would not be so victimized at the University of Michigan. This was a promise that his domestic partner would receive medical insurance coverage throughout his career when in fact his career was to be dead ended as a result of the failure of the University to keep the promise it made to him. Plaintiff had a right to rely on that promise. Indeed, the denial of tenure based upon Plaintiff's sexual orientation is a violation of his constitutionally protected property interest that the tenure review process be fair. *Purisch v. Tennessee Tech. University*, 73 F3rd 1414 (6th Cir. 1996) In this case, there is no question but that the promise was made and that it was made under circumstances that was intended to induce action of a definite and substantial character and which in fact produced reliance of that nature. In the words quoted from *Derderian v. Genesys Health Care Systems,* 236 Mich App 364, 689 NW2nd 145 (2004) the doctrine "should be applied only when the facts are unquestionable and the wrong to be prevented undoubted." Here the facts are not an issue and are unrebutted on the record below. The wrong to be prevented is undoubted for reason that the use of Plaintiff's sexual orientation as well as the factors in the tenure review deprives him of his property interest in a fair tenure review. For these reasons the Defendant's application on this issue should likewise be denied.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing brief and the lack of sufficient showing by the Defendant, Plaintiff respectfully requests that this interlocutory request for leave to appeal be denied. Plaintiff is willing to forego his appeal rights on the dismissal of the

third count of his complaint until after trial on this matter is concluded. The Defendant should do likewise.

RESPECTFULLY SUBMITTED,

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

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Counsel for Plaintiff

Dated: September 22, 2006