

**STATE OF MICHIGAN**  
**IN THE COURT OF CLAIMS**

**Peter J. Hammer,**

Plaintiff

vs.

Case # 04-241 MK  
Hon. James R. Giddings

**Board of Regents of the University  
of Michigan,**

Defendant

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**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S  
MOTION FOR SUMMARY DISPOSITION**

**BACKGROUND**

This is a motion for rehearing on Defendant's Motion for Summary Disposition. It is not based on a jurisdictional defect but rather is asserted on the grounds that there being no genuine issue as to any material fact, the court may decide the issues posed as a matter of law. In pursuing this line of attack, the defendant does a great disservice to the court and to counsel by asserting facts as though that testimony cited was uncontested when it knows the assertion to be contested by competing evidence. It further does a disservice to the court and counsel by citing as authority transcript and

brief references that either do not support the statement in the brief, or in many cases, instead stand for the truth of the contradiction. To give the court a flavor of such statements, the following are typical.

On page 4 of the defendant's brief it states: "Before he began his employment at the University, Hammer made known to those who hired him that he was homosexual (214-215)" Reference to the pages in question show that Hammer advised Kent Sevyrud of that fact in inquiring about same sex partner benefits. Sevyrud is not the individual that hired Hammer. On page 7, defendant states "Hammer was relieved of teaching, administrative and service responsibilities in the fall semesters of 1998 and 2000, so he could devote full time to his research (Ex. D; 162-164; Lehman 9-10, 27)" Not only do these references not support the proposition, but in important way, they conflict with it. Hammer testified he was not relieved of his administrative or service responsibilities. Lehman testified he did not know if Hammer was relieved of administrative or committee assignments during those times. Exhibit D speaks only in terms of relieving Hammer or responsibility for the Cambodian Project.

On page 5 of the defendant's brief it states: "Hammer understood that he was not granted tenure in 2000 and that there were concerns about his scholarship (47, 57, 61, 63, 65)" On page 47, Hammer acknowledges disappointment in being deferred, but there is no discussion of the reasons for the deferral. On page 57, Hammer specifically stated he was not told what the vote was, nor the tenure committee recommendation, nor what the faculty deliberations were. On page 61 he testified he was told that some of the reviewers were not as enthusiastic as Professor Lempert would have wanted and that there was a belief that his projects were too large and too complex. On page 63 he

testified that one professor thought his work was too abstract and another did not understand his article. Finally, on page 65, Hammer testified that there was some information provided by a colleague that his work did not play well to the law and economics community. While the last citation could arguably support the proposition, the first three do not and in fact the second stands in direct conflict with the proposition for which it was cited.

Also on page 5 of its brief defendant asserts that the granting of a two year deferral was unprecedented, citing Lehman's self serving letter and citing the assistant provost, Frumkin, at page 47. In fact, Frumkin did not testify the deferral was unprecedented, but used the expression "not customary" to describe it. Frumkin had been at UM for two years at the time this occurred so it is difficult to understand how he would have know what was customary at that time in his career. In reality, Jessica Litman recently rehired by U of M with tenure had previously had her tenure decision deferred for two years and thereafter denied. As recently as February of 2006, Susanna Blumenthal had her tenure decision deferred for two years.

These are but a few examples of the duplicitous approach the defendant has taken in an effort to improperly focus the court on legal issues the court cannot decide. The legal issues can only be determined by the court in the absence of issues of fact that first need to be resolved.

## **INTRODUCTION**

The seeds of the relationship between these parties were sown years before Peter Hammer gained employment as a tenure track associate professor at the

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

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

Throughout his student years at the University of Michigan Peter Hammer remained closeted with respect to his sexual orientation. Long before seeking employment at UM Peter Hammer began a serious relationship with Suny Ky. They became domestic partners in 1991. It was during the recruitment process involving

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

It was during this process, after the offer of employment was extended but before it was accepted, that Peter Hammer sought assurances of non-discrimination as well as domestic partner health care benefits. Kent Sevyrud, the Associate Dean for Academic Affairs at the Law School wrote to Peter Hammer on March 27, 1995 and included with his correspondence an announcement of November 4, 1994 signed by Jackie McClain,

then with the Human Resource and Affirmative Action Department at the University of Michigan and a copy of the City of Ann Arbor domestic partnership registration information, giving assurances of domestic partner benefits, and assurances of non-discrimination based upon sexual orientation. (Exh. 1) In addition, Peter Hammer sought similar assurances of non-discrimination and domestic partner health care coverages from Professor James Boyd White who was the chairperson of the Personnel Committee of the Law School that had extended the offer of employment to the Plaintiff.<sup>1</sup> In addition to being assured that his domestic partner would be covered by health insurance the Plaintiff was also assured that his sexual orientation would not be an obstacle to, among other things, his achieving tenure. It was based upon these assurances that Plaintiff accepted employment at the University of Michigan as opposed to one of the other institutions that provided similar benefits and similar protection. (See Hammer affidavit)<sup>2</sup>

Hammer began his employment in May of 1995 and undertook in earnest to demonstrate the qualities that would ultimately lead to tenure at the University of Michigan Law School. His teaching and his service to the University have been described as "universally regarded as terrific" and "exemplary and extraordinary", respectively, by the person who would ultimately vote against him at tenure time. During the few years following his hire he had won two teaching awards. (Exh. 2) On November 18, 1997 Hammer was notified that he would be eligible for his mid-

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<sup>1</sup>Notably absent from this short list are the names of those the defendant now claims knew of Hammer's sexual orientation before an offer of employment was extended.

<sup>2</sup>The benefits that Georgetown and UCLA were going to provide for Suny Ky were through a separate offer of employment for him, as opposed to his being covered on Hammer's policy.

sabbatical leave in the Fall of 1998 and for his Sabbatical leave in the Fall of 2001.

(Exhibit 28)<sup>3</sup>

In February, 2000 Hammer first went up for tenure. The tenure process at the Law School for individuals hired without tenure differs from the tenure process used to hire individuals from the outside with tenure. With respect to the latter, all faculty, tenure track and otherwise, clinical and otherwise, participate in the process and in the discussion of the candidate. The process is transparent. Individuals hired without tenure who thereafter seek tenure are discussed and judged only by the tenured faculty. (Hammer Affidavit). The process begins with the appointment of a tenure committee. That committee studies the candidate's service, teaching and writings. It solicits reviews of the candidates scholarship from faculty members as well as scholars at other universities and compiles a dossier that is distributed to the tenured faculty. (Howse 5). It then forwards a recommendation to the tenured faculty thereon. Two secret meetings of the tenured faculty are held which culminate in a tenure vote at the close of the second meeting.

In 2000 when Peter Hammer went up for tenure, the faculty voted to defer for a period of two years the decision whether or not to grant tenure. Jeff Lehman, the Dean of the Law School, apprised Hammer of the vote to defer the tenure decision for a period of two years and also advised him that in the event the tenure vote was not favorable in 2002, that the 2001 and 2002 year would be his terminal year at the

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<sup>3</sup>While the defendant suggests there was something unusual about these leaves, it is utter nonsense. Also, while Lehman seems to suggest that the 2001 leave was in some way specially bestowed by him to help Hammer out, Hammer's eligibility for this sabbatical leave was determined long before any tenure issue arose.

University of Michigan Law School. (Exh. 3) This letter violated UM policy in two important respects. First, it was contingent in nature. Second, it failed to give adequate notice.

During the months that immediately followed, Hammer became concerned that if he was voted down for tenure in February of 2002 and his employment ended a few months thereafter that he would have insufficient time to market himself to other colleges within UM as well as other universities for the start of the Fall 2002 term. He also had concerns that the pressure that was placed upon him was distracting and would create problems for him in attempting to be productive in his scholarship to satisfy the faculty that he deserved an award of tenure. In July, 2000 Hammer expressed those concerns to Lehman and Lehman assured the Plaintiff that he would be allowed to teach in the 2002-2003 academic year irrespective of whether the vote was favorable or unfavorable in February of 2002. (Exh. 4) With that assurance the Plaintiff set about performing his responsibilities to the best of his ability. Plaintiff's curriculum vitae shows teaching awards and honors received; a Robert Wood Johnson Foundation Health Policy Investigation Award; 15 publications and works in progress; 3 "other" publications; 22 presentations at various anti-trust law sections, universities and foundations; seven other presentations at the University of Michigan, the University of Phnom Phen and six other professional and service affiliations, all of which demanded considerable time.

In February of 2002 Hammer went up for tenure again. A tenure committee headed by Robert Howse collected and analyzed various internal and external reviews of the Plaintiff's writings and generated three different reports. The majority report

recommended tenure for Peter Hammer and described the reasons therefor. (Exh. 5) A concurring report by Professor Malamud likewise recommended tenure. (Exh 6) A report generated by Professor J. J. White who had not reviewed all of Hammer's writings recommended against tenure. (Exh. 7) At the end of the second faculty meeting a vote was taken and according to the notes taken for that meeting the final vote was 18 in favor of tenure with 12 opposed. (Exh 8) Because the law school requires a super majority vote (two-thirds of the tenured faculty attending the meeting) Plaintiff's bid failed by a narrow margin. It was apparently the consensus that Hammer should be offered a terminal year contract. (Exh. 8)

After Hammer was advised of the vote he attempted to ascertain the reasons for the narrow failure. Faculty that attended the meeting were all instructed by e-mail not to discuss what had transpired at the meeting with Peter Hammer but to maintain confidentiality. (Exh 9; Caminker dep at 79-80) Hammer then sought to obtain documents that related to the process most notably the internal and external reviews but was denied access to them by the Associate Dean, Evan Caminker. (Exh 10; Caminker dep at 95) Hammer was aware that the Provost's Office was to conduct a review and so Hammer wrote a lengthy letter to the Provost without the courtesy of an acknowledgment that it had been received. (Exh. 11; Courant dep at 30-31) The Provost determined not to intervene in the decision to deny tenure but never notified Hammer of the decision instead believing that the Law School would undertake that task. (Exh.12) The Law School similarly did not notify Hammer believing that the Provost would undertake that task and so Hammer was not advised until late in the Fall of 2002 that his Provost review had been unsuccessful. (Exh 13) Hammer requested

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

The grievance process included a review by Dean Lehman and ultimately a review by the Provost which did not culminate in a decision until mid-March of 2003. (Hammer affidavit) During this entire time, Hammer was attempting to find other situations within the University of Michigan that would permit him to take advantage of his health law expertise, his economic expertise as well as his legal expertise and teach within other units of the University perhaps teaching within the Law School on a limited basis as well. This was a practice that the University engaged in the past and was

currently engaged in and Hammer received encouragement from the Dean and the Provost's office throughout the period. (Hammer affidavit)

While Hammer was hopeful that these efforts would ultimately lead to continued employment at the University of Michigan, he also was pragmatic about the continuation of health care benefits for his domestic partner and so as a safety net, he sought other employment where those benefits could continue and ultimately accepted a position with Wayne University Law School in mid-March of 2003. This was two months after he had demanded a hearing having asserted that he had *de facto* tenure at the University of Michigan and was denied the opportunity for such hearing despite the explicit terms of the University of Michigan Regent's By-Law 5.09. (Exh 16) It was at that point that Hammer brought this suit.

### **Statement of Facts**

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

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

During his teaching years at the University he came in contact with professors with whom he had dealt previously as a law student. He was neither a stranger to the campus nor to the faculty. It was a circumstance under which one might expect a level of familiarity greater than that which occurs when a new hire is brought into the law school faculty. Despite this Hammer found himself socially ostracized. While indeed he participated in a monthly poker game with certain of his colleagues, he found that when he attended faculty functions at which families were included he was on the outside looking in so to speak. The demeanor of other faculty members with their spouses and their children was such that Hammer, his partner and the children of their extended family were not treated as welcomed guests but as bystanders. On occasion, a senior member of the faculty would ask Hammer how his "wife" was. The individual certainly had knowledge that Hammer was gay and had a same sex partner. On other occasions another senior member of the faculty would ask what the children referred to him as, repeatedly asking as if intoning a mantra, "what do they call you, what do they call you, what do they call you, what do they call you." Hammer heard remarks in the faculty lounge from a table of tenured faculty members and which included J. J. White (the dissenting tenure committee member) and others who voted against him about having to be either or homosexual or Israeli to get hired at the Law School and that there was need to for an affirmative action program for straight faculty members. No one at the table took offense or objected to the remark although Plaintiff does not know which of the individuals made the remark.

Plaintiff also observed the mistreatment of others. He observed disparagement of James Hathaway in his professional capacity as not being a serious scholar and,

when his lesbian colleagues, Brodie and Schacter, were expecting a child through artificial insemination, he heard crude jokes dealing with turkey basters and other snickering and crude remarks. This was in stark contrast to the "googoo eyed" welcoming that would be met when heterosexual faculty members announced their spouse's pregnancies. (Hammer affidavit)

In addition, Plaintiff had heard stories and learned the lore of the Law School faculty as it applied to gay faculty members "coming out". This history was provided to him by two of the most senior faculty members at the law school - individuals who have an extensive knowledge of the history and to some degree are directly affected by the animus Hammer complains of. James Martin had been hired and tenured during periods of time that he was believed to be heterosexual. He was married. When he came out, it was a surprise to faculty members. Ultimately James Martin succumbed to Aids and was the first Aids death in Washtenaw County. J. J. White, a senior faculty member and a close associate of Martin's, wrote a memoriam for him in the Law Review. (Exh. 17) It demonstrates the cool and impersonal way that White's feelings towards Martin changed after he had come out. Similarly, there are tales of David Chambers having been groomed for the Dean's position while he was married and with children and presumed to be heterosexual only to be shunted aside after coming out. In addition, even following the denial of tenure but during Hammer's last year in residency at the University of Michigan Law School his friend Rob Precht was asked to leave his Assistant Dean's position as a result of a study group critique of his performance, the group having been chaired by J. J. White. (Hammer affidavit)

Peter Hammer had every reason to believe that the atmosphere at the Law School was one of hostility towards gay individuals. Hammer was more observable than most because he brought his Cambodian partner and the children of that extended family to University functions. Moreover, Hammer was the only man to be denied tenure over a period of decades and was the only openly gay man who had gone up for tenure during that period. (Hammer Affidavit) While his scholarship was thought of highly while he was a student and was closeted, at tenure time it suddenly became a problem for a few of his tenured colleagues.

Following the denial of tenure, at every instance where Hammer sought information and insight into the process that led to his denial he was denied access. He was denied access to his colleagues. He was denied access to the internal and external reviews. He was denied access to the grievance machinery. He was denied access to information concerning the status of the Provost review. And so Peter Hammer ultimately brought this action. A brief digression of Hammer's efforts and the defendant's stonewalling tactics is instructive. Their efforts to hide information and deny neutral review of their actions are tantamount to "flight" by an accused.

Within two days following the denial of tenure, Hammer asked Lehman to soften the gag on information that had been imposed so that Hammer could better understand the reasons for the decision. (email from Hammer to Lehman) On February 25, 2002 Hammer emailed Lehman requesting information about the Provost Review. On February 26, 2002 Lehman misinformed Hammer of the nature of the review indicating the Provost is provided with a statement describing the action and the candidates CV. (Email from Lehman to Hammer) He did not inform Hammer that the provost will also

have access to the entire tenure file – documents that Hammer has not had access to himself.

Apparently with full knowledge of this interchange, Caminker, the associate dean, then advises one of the tenure committee, Malamud, who favored a grant of tenure that no one should tell Hammer what transpired at the meeting and that he, Caminker, would “run interference” to make it easier for faculty to stick to the boundaries set for them on information. (Email from Caminker to Malamud, February 27, 2002) Lastly, to maintain surveillance of Hammer’s efforts, he requests that she notify him before she speaks with Hammer.

On February 28, 2002 Lehman wrote to the provost providing the provost with Lehman’s description of events as well as Hammer’s tenure file. He labeled the letter “Confidential, Preliminary and Advisory”. When questioned about why the letter bore such a caption, he testified that it was in an effort to prevent it being disclosed under the Freedom of Information Act. By so labeling it, he felt it fell within an exception to the act, even though it was not preliminary nor advisory in nature. (Lehman 97-98)

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

Unlike the defendant’s efforts, Hammer was always forthcoming with information. On March 19, 2002 Hammer sent Lehman, Caminker and Howse copies of a letter

Hammer intended to send to the provost to assist in his review. This letter was later sent to the provost on April 4, 2002.

Hammer again addressed the issue of being denied access to information concerning the tenure decision by email to Lehman dated May 13, 2002. It was followed by an equally unsuccessful telephone conversation between the two on May 17, 2002. On May 30 Hammer emailed Lehman concerning the Provost Review, alternative employment and obtaining additional information. He raised the possibility of filing a grievance as well as the possibility of discrimination and made a formal Bullard-Plawecki Employees Right To Know Act demand for all of his personnel records.

While he was being advised that information regarding the tenure process was confidential, he sought information about the existence of such a policy at the law school and was advised by Caminker that no formal law school policy existed regarding confidentiality norms. This was confirmed by email from Hammer to Caminker on June 6, 2002. Finally, on June 14, 2002 Lehman forwarded to Hammer a copy of his (Lehman's) email to the tenured faculty dated February 22, 2002 in which Lehman admonished the faculty not to discuss the process that led to the tenure decision, the actions of the tenure committee and the faculty as a whole, any statements made during the process or how anyone cast their vote. On July 15, 2002, Hammer – continuing to pursue the matter – emailed Lehman renewing his objections to the law school confidentiality "policy" and outlining his concerns about discrimination. In particular he detailed statistics showing a history of bias against women, gays and lesbians, a history of inappropriate sexist comments, a history of mistreatment of gays, inappropriate anti-gay jokes and comments and hostility to non-traditional families.

Still in the hunt for information, on July 17, 2002 Hammer emailed Caminker re the status of his ERTKA demand. On the same day he emailed Lehman questioning the law school's grievance policy and renewing his concerns about discrimination. Finally, on July 26, 2002 the first of the requested information is provided by the law school. Absent from the production are the tenure committee reports from 2000 and 2002. The information from reviewers is redacted and mixed in a single document so that Hammer cannot tell who wrote what and which criticisms were accompanied by either other criticisms or compliments. The single document was a randomized conglomerate of remarks contained in various internal and external reviews. This was despite the fact that a number of reviewers had no objection to Hammer seeing their reviews. While some did not care, others were distressed at the prospect that Hammer would know what they had to say about his tenure case. Of particular note was Friedman. Friedman spoke strongly against Hammer at the tenure meeting and weeks later wrote a colleague saying the opposite of what he had said during the tenure meetings. This is more fully discussed later. Friedman's remark -- a single word -- emailed to Caminker, best describes his reaction to the possibility of revealing his review of Hammer: "F - - -!" This writer won't spread the word on this record but would be happy to share with the court the email in question if there is any question about the nature of the word.

On August 12, 2002, Hammer is notified by Rozana Kelemen from the Dean's office that he is receiving a merit rate change in his salary for the following year. The next day Hammer wrote back to the Kelemen, from Dean Lehman's office, asking if the merit increase has anything to do with the provost review since he has received no

notification from the provost or the law school regarding the provost review of the tenure decision. On the 14<sup>th</sup> of August, 2002 Lehman notifies Hammer that none of the issues he wishes to raise are grievable. Lehman summarily dismisses the concerns Hammer expressed about discrimination, apparently without determining the basis for Hammer's claims.

Hammer, undeterred by the stonewalling tactics, emailed Caminker on August 19, 2002 objecting to the form of the disclosure under ERTKA and asking for additional documents related to the provost review. On August 20, 2002 Hammer filed his grievance.

There is an immense amount of information available. It is difficult to sift out what may not be important to this motion. For our purpose, suffice it to say that from August 20<sup>th</sup> until the spring of 2003, Hammer had more than a half dozen communications with the administration on the withholding of information to which he was entitled. He had in excess of two dozen communications with the administration on the topic of his grievance. He had in excess of a dozen communications on the topic of provost review. He had numerous contacts with the administration on the subject of alternative employment within the University. These communications took on various forms (telephone, email, letter or conference) and were directed to or from Lehman, Caminker, the Grievance Review Board or the provost's office. In the end, all of his efforts were for naught in that the provost affirmed the decision of the dean of the law school to the effect that Hammer was not permitted to grieve any of his claims including

his claim that he was being discriminated against and his claim that he was improperly being denied access to information.<sup>5</sup>

Since having brought this action and having gained access to much of the information that was foreclosed to him following the denial of tenure Hammer's beliefs concerning his victimization have solidified. First, of all of the external reviews of his scholarship only one, which was a partial review, suggested that tenure not be granted. (Exh. 18) The reviewer, Einer Elhauge, was an individual who had been stricken from the list of potential reviewers by Hammer in 2000 at the time of that tenure review but somehow made it back on to the list in 2002. (Hammer affidavit) Mark Hall, who would have been a natural person to be selected as a reviewer was stricken from this list by the committee. According to one of the individuals that voted against tenure, Hall should have been allowed to review Hammer's work. (Schneider dep 15-17)

The evidence adduced through discovery in this matter suggests that the one dissenting vote on the tenure committee and a vote that influenced some of the senior faculty members to vote against tenure for Peter Hammer was written by J. J. White, a tenure committee member who had not read all of Hammer's publications. (Herzog at 18, e.g.; Exhibit 30) Irrespective of the potential influence of the White dissent, at least four of the negative votes are demonstrably tainted by individuals who condemn homosexuality as a sin or an abomination, who oppose same sex marriage or who have demonstrable homophobic traits. Furthermore, at least three additional individuals who voted against tenure have demonstrated serious credibility flaws with respect to their

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<sup>5</sup>Because of the sheer volume of exhibits the documents that evidence the chronology of events immediately preceding (otherwise unidentified by Exhibit reference) are all contained in a single exhibit numbered 31)

assertion that they voted against tenure for Peter Hammer because of his scholarship such that summary disposition would be inappropriate. (Appendix on Credibility<sup>6</sup>)

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

It is Plaintiff's position in this case that if four votes were contaminated by anti-gay bias, those votes should be declared void by the Court as being in violation of the contractual standard agreed to between Peter Hammer and the University of Michigan prior to his employment thereat. If those four votes are void, then the resulting vote count is 18 in favor and 8 opposed resulting in a super-majority vote in favor of Hammer.

The following discussion centers on the facts as they relate to the issue of credibility. **They are amplified in the Appendix on Credibility**, but are briefly outlined here so that the court has a sense of the duplicity with which Plaintiff's discovery efforts

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<sup>6</sup> Because of the convoluted testimony of several of the law professor witnesses, the discussion of credibility is extensive and is included in a separate appendix for the court's perusal so as not to distract from the discussion of the legal issues before the court. It does, however, raise the specter of what burden the plaintiff has on a summary disposition motion that is premised on misstatements's of fact, erroneous or fictitious references to the record, and affidavits and assertions of facts that turn out to be perjurious in nature. These include the recent revelations that Brodie and Schacter, after returning to Wisconsin from Michigan almost immediately sought visiting professorships in California and have now accepted positions there. Additionally, at the very time defendant was asserting that the deferral of tenure for Hammer was unprecedented, defendant was offering a tenured position to Jessica Litman, who was previously denied tenure after a deferral of that decision, and defendant had just recently deferred the tenure decision for Susanna Blumenthal. Thus, it is hard to imagine that the mis-representations being made to the court were innocent.

have been met. Each of the people discussed either voted against tenure for Hammer or recommended others do so.

### **William Miller**

#### Deposition testimony

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

#### Contrary Evidence

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

### **Richard Friedman**

#### Deposition testimony

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

#### Email correspondence with colleagues 2 months following the vote to deny tenure

- Hammer is a mover and a shaker
- Hammer's service is exemplary and extraordinary
- Hammer's teaching is universally regarded as terrific
- Hammer is clearly a leader and a mover and shaker in health care (Exh 19)

#### **Kyle Logue:**

#### Deposition testimony

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

#### Private Investigator tapes and Huron Hills Baptist Church web site

- Strongly Pro Life and anti abortion (Private Investigator report)
- Homosexuality is a sin and an abomination (Huron Hills Baptist Church Website)

links)

- Homosexuals may only join the church if they agree to reform their ways (Private Investigator Report)
- Wrote email to Hammer concerning an article he reviewed for him and was very complimentary (Exh. 20)

### **Carl Schneider**

Deposition testimony

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

Writings authored by or subscribed by Schneider

- Member of the Council on Family Law as recently as 2005 (Exh. 21)
- As a member is listed on a publication that recommends against legalizing same sex marriages. (Id. At 24)
- Has written repeatedly on the subject of homosexual marriage rights (Exh 22)

### **Don Herzog**

Deposition testimony

- Voted against tenure because Hammer's scholarship was poor (Dep 8-9)
- Thomas Kauper was the senior most antitrust expert on faculty (Dep 14-15)
- Did not recall seeing any written evaluations of Hammer's work by Kauper (Dep 16)

- Felt Kauper's speech at the tenure meeting for Hammer was luke warm when it should have been forcefully positive and that reinforced his negative opinion.  
(Dep 15)

#### Contrary evidence

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

#### Jeff Lehman

##### Deposition testimony

- Never been publicly accused of being homophobic (Dep at 30)
- Would rather have college receive federal funds even if it meant aiding and abetting in sexual orientation discrimination contrary to college policy and city ordinance (31-33)
- Would even extend the same principles to African Americans if the legal principles that applied were the same as those that applied to gays and lesbians
- After Hammer was denied tenure he gratuitously extended his employment for a year (Exh. 24)
- He was under no obligation to do so (Exh. 24)

##### Contrary evidence

- Cornell Daily Sun showed accusations of homophobia (Dep 30-31)
- Lehman acknowledged he had been publicly accused after he was reminded of

the publication (Dep 30-31)

- Hammer's additional one year contract was actually awarded in July, 2000 at the request of Hammer (Dep 79; Exh. 4)
- Even aside from the extension given in July 2001, Lehman was under an obligation to provide another one year contract to Hammer under the Standard Practice Guide (Defendant's Ex. O)
- Even aside from the SPG, the tenured faculty had agreed to give Hammer another one year contract (Exh. 8)

### **Sherman Clark**

#### Deposition testimony

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

#### Contrary evidence

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

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

#### Deposition testimony

- The provost does not conduct a substantive review of tenure decisions but rather reviews to make sure the mechanisms for the tenure review are working properly.

- The input of the law school was critical in the provost's decision to affirm the denial of tenure for Hammer.

Contrary evidence:

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

There are additional faculty whose credibility is in issue, but the above should give the court a flavor of the kind of credibility issues that exist. Because of the extensive nature of the credibility conflicts, they are attached as an appendix so as to not distract too much from the discussion of the legal issues.

There is, however, one additional credibility issues that the Court needs to consider. It is one that raises a suspicion of obstruction in this writer's mind. Defendant initially moved for sanctions against the Plaintiff asserting that two lesbian professors who were mentioned in the Complaint had demanded Hammer remove those allegations from his Complaint because they were untrue. The allegations dealt with their leaving UM because they did not fit in with the law community. Brodie and Schacter provided affidavits asserting that Hammer's allegations were false and that they so informed him when they demanded the allegations be removed. Hammer has denied these facts and instead has indicated that these individuals maintained a private

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

and a public story. The one he told was their private story. The one contained in their affidavits was their public story. Defendant has seen fit to revisit these assertions in the context of its motion for reconsideration, and has attached the two affidavits in question to its recently filed motion. These affidavits are signed on February 14, 2006. They are signed and notarized in California (not Wisconsin, where the two pined for when they were at UM). They are signed and notarized at a time when, if a law professor was interested in changing universities, one might expect them to be interviewing.

What counsel has recently learned is that Brodie and Schacter – who so missed their friends in Madison that they left prestigious jobs at UM and sold their recently purchased home – have accepted positions at Stanford University Law School and have left their treasured and cherished friends in Madison. As Yogi says, de javu all over again. One must wonder whether at the time they were seeking references for their positions at Stanford, they were being pressed to sign an affidavit that Hammer knows to be false. For the defendant to argue that Brodie and Schacter left UM to return to their beloved Madison at a time when it surely knew they were interviewing for a job that took them thousands of miles away, borders on a deliberate attempt to mislead the court. When viewed alone it is significant. When viewed together with the false assertion that Hammer's tenure deferral was unprecedented, and the revelations concerning the Provost's false testimony, it is cause for concern that there is a deliberate effort to mislead the Court.

### Argument

#### I. **Summary Disposition of Dismissal on Hammer's Claim of Reasonable**

## **Expectations Should be Denied**

### **A. The pre-employment representations made to Hammer are legally enforceable**

Hammer was recruited to come to the University of Michigan Law School. During the recruitment process, he had discussions with J.B. White, the Chair of his personnel committee. He also had discussions with Kent Sevyrud, the Associate Dean for Academic Affairs. While he spoke with various faculty members, their assurances likely do rise to the level of an enforceable commitment. But the assurances given by Sevyrud and J.B. White do.

During the recruitment process Hammer had not disclosed to anyone that he was gay. He made a careful decision to only reveal this after he had received an offer. Once he received the offer, however, he wanted to have every assurance that his sexual orientation would not be a hindrance to his career and that his partner would be covered by his health insurance plan. He received those assurances from both Sevyrud and J.B. White. He was also provided with university policies and city ordinances that were intended to and did lead Hammer to conclude that he would not be discriminated against based upon his sexual orientation.

Defendant has asserted that Hammer's claim is not one for termination of employment and that therefore, the law provides no protection for him from these unkept assurances. This argument is feckless. While in their motion for reconsideration they cast Plaintiff's claim as one to be free from discrimination based upon policy, it has not changed the substance of Plaintiff's claim, namely, that he had a reasonable expectation that he would not be terminated from his employment at UM Law School

based upon his sexual orientation. Like other claims of discrimination, he does not have to prove that this was the only reason, or even the main reason. He need only prove that it was one of the reasons that made a difference in the decision to terminate his employment. M Civ. JI 105.02

This is a case for wrongful termination. Defendant in its argument "cherry picks" the holdings of various decisions trying to leave the bitter and take the sweet. By way of example, Defendant argued on page 11 of its original brief that the Supreme Court in *Dumas v. Auto Club Insurance Association*, 437 Mich. 521, 531; 473 NW2nd 652 (1991) refused to extend the reasonable expectations doctrine to policies dealing with compensation. To the extent it cites *Dumas* for that principle it accurately cites it. However, in the following paragraph of its original brief on page 11 it argues that the faculty hand book does not constitute a contractual obligation but instead only represents a "commitment" by the University and does not rise to the level of a contractual undertaking. In making this statement it ignored the fact that the Court in *Dumas* refused to apply the *Toussaint* principles to accrued compensation because, *inter alia*, the accrued compensation cases ". . . are subject to contract law, the 'legitimate expectations' doctrine of *Touissant* does not follow traditional contract analysis. Therefore it does not logically follow that *Touissant* should be extended to the area of compensation." (*Dumas* at 531) The Court held that the reasonable expectations' doctrine does not extend to areas in which traditional contract law would provide some guidance. This principle is ignored by Defendant.

Also ignored by the defendant is the fact that the policy does not state it does not create any contractual obligations, but rather that it does not create any contractual

obligations that cannot be changed. Defendant has never asserted that the policies upon which Hammer relies have been changed in any material way. To the extent defendant relies on case law that validates the principle that a policy manual may disclaim the creation of contractual obligations, those cases are at best inapposite to the issues at bar.

The cases cited by the Defendant do not hold that pre-employment assurances cannot create a reasonable expectation of employment terminable only for a specific cause. In the case at bar, it is alleged that Hammer could not be terminated because of a specific cause, namely, sexual orientation. It is unconscionable of the defendant to admittedly provide these assurances to Hammer knowing he intended to rely on them only to claim now that they are unenforceable.

The primary thrust of the Defendant's argument is that by maintaining a policy in the Standard Practice Guide that prohibits discrimination based upon sexual orientation the University does not thereby create a reasonable expectation that one will not be terminated based upon their sexual orientation. That of course is not the claim that was pleaded by the Plaintiff in Count I of his Complaint nor is it the underlying factual basis for Plaintiff's claim. Plaintiff has pleaded and has adduced testimony that reflects that the University maintains such a policy and that, in addition, the Associate Dean for Academic Affairs as well as the Chairperson of the Personnel Committee both gave oral assurances that Plaintiff's sexual orientation would not be used against him and to the contrary the diversity that he brought would enhance his ability to remain at the University. They went beyond that however and Mr. Sevyrud forwarded to the Plaintiff a copy of the Ann Arbor City Ordinance in an effort to further assure the Plaintiff that he

could have every expectation that his sexual orientation would not work to his detriment in the employment relationship that they wished to exist between he and the University of Michigan Law School.

Defendant accurately states that policies may be changed, and an action for wrongful termination that relies upon a policy that no longer is in effect might well fail as long as the policy change has applied uniformly and has been communicated to all of the employees. The University, of course, has never changed this policy and to this day it still maintains as the policy of the University.

The appropriate analysis for a case claiming a termination contrary to a legitimate expectations for just cause is to determine first, what if anything the employer has promised and second, whether or not the promise was ". . . reasonably capable of instilling a legitimate expectation of just cause employment." *Rood v. General Dynamics Corp.*, 444 Mich. 107, 138-139, 507 N.W.2d 591 (1993). While 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 has been made." *Rood, supra* at 138-139. Ironically, while the Defendant has argued that while its policy is only a commitment and therefore not enforceable, "commitment" is the precise term that the Supreme Court used in *Rood* in determining that a representation would be enforceable, i.e., that a commitment was made.

In accordance with the analysis set forth in *Rood*, it is quite clear that Plaintiff has provided sufficient evidence to defeat Defendant's motion for summary disposition. There is no doubt but the commitments upon which the Plaintiff relied have in fact be

made. There is certainly evidence to that effect both by virtue of Plaintiff's affidavit as well as his testimony in deposition. In addition there are documents to verify the communication between Plaintiff and at least Sevyrud on that topic.

As to whether or not the type of commitment was such that it manifested an intention to act or refrain from acting in such a way as to justify Hammer's reliance on the commitment, sending an ordinance that assures the Plaintiff that he is protected by law from the type of discrimination that he has expressed concerns about as well as assuring him orally and with written policies of the University that his sexual orientation will not be a hindrance to his obtaining tenure (i.e., permanent employment as opposed to termination at the end of the tenure process) would certainly instill a reasonable expectation and one might justifiably rely on those statements. For those reasons the motion should be denied.

**B. Hammer has adduced evidence of sexual orientation animus on the part of the decision makers rendering summary disposition inappropriate.**

In this summary disposition motion, the court should view the evidence in a light most favorable to Hammer and should draw all reasonable inferences in favor of Hammer, not the defendant. *Hall, v. McRae Corp.*, 238 Mich App 361, 369-70; 605 N.W.2d 354 (1999) Likewise, the court may not resolve credibility issues, but should leave them for trial. *Michigan National Bank-Oakland v. Wheeling*, 165 Mich App 738, 744-45; 419N.W.2d 746 (1988) In this case, credibility issues abound. Many of the credibility issues go to the intent or state of mind of the decision makers thus rendering summary disposition even less appropriate in this case.

In *Veenstra v. Washtenaw Country Club*, 2004 Mich App 1081 (2004) the Court of Appeals had occasion to deal with a fact setting similar to the one at bar. There, Plaintiff had claimed he was being discriminated against in being terminated as a golf pro at a private country club because of his marital status. The board members all denied that their decision had anything to do with his marital status and filed affidavits so attesting. Plaintiff offered evidence which, if believed, showed that three board members had been overheard to express disapproval of Veenstra's divorce and that they had to get rid of him. They also stated that the situation was disgusting. The evidence was such that the relationship between the remarks and the reasons for the vote to terminate were described by the Court as "ambivalent". The court held, however, that the evidence was sufficient to permit an inference that the remarks were related to the motives of the board and that therefore, summary disposition was not appropriate. *Veenstra, supra* at 2004 Mich App Lexis 1081, p.2 (2004).<sup>8</sup>

Like *Veenstra, supra*, this case too involves mixed motives. There were 30 decision makers at the tenure meeting held for Hammer. To say they spoke with a singleness of mind would be foolish. However, in scrutinizing the minority voters behavior, one finds certain trends. There are the extremes such as Kyle Logue who complimented Hammer on his writings while reviewing them as a critic (see Exhibit 20), only to vote against him at tenure time (Logue dep. at 7). Logue's religious beliefs and his efforts to hide them give rise to an inference that he had an aversion to Hammer's homosexuality, an inference supported by his lack of candor about his beliefs as well as

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<sup>8</sup>This opinion was unpublished. It was the second time the court dealt with the issue. Originally, summary disposition was appealed to the Supreme Court. After remand, the trial court again granted summary disposition. This opinion deals with the latter event and is attached.

by Hammer's testimony that he (Hammer) was marginalized at family picnics and the like.

There are those who attribute their negative opinions to facts that are easily disputed, such as Don Herzog who was struck by a speech given by Tom Kauper, when in fact, Kauper was not present to give a speech. There are those who spoke with a forked tongue, like Friedman, who testified he voted against tenure because the quality of his writings was poor and that he would never become a leader in his area, and yet in writing his colleagues two months later, stated just the opposite.

When viewed in light of Hammer's affidavit respecting the kinds of remarks and unprofessional treatment is accorded to gay and lesbian faculty, reasonable inferences can be drawn that this workplace environment is tainted by anti-homosexual animosity. Gay and lesbian faculty members are not accorded the same respect their heterosexual counterparts give one another. They are not looked upon as being as professional as their heterosexual counterparts view one another. Their work is diminished. They feel uncomfortable and are made to so feel by the remarks and the aloofness of their colleagues.

Some further discussion of Lehman is in order. Aside from the fact that his credibility is seriously in issue, there is now an added fact that his communications with the provost – that he denied but the provost admitted to – were untoward. According to the Whitman email attached as Exhibit 32 the provost would have recommended against tenure for Hammer even if the faculty had voted in his favor. Since the provost does not do a substantive review, the reason for this strongly unfavorable opinion would have to have been whatever input Lehman provided – input that Lehman denied.

As was discussed previously, the state of mind of least seven of the "no" voters is in issue and their credibility respecting the feelings about homosexuality, same sex marriage and the like is clearly in issue. Given the atmosphere that prevailed for gay and lesbian faculty members, the fact that the dissenting member of Plaintiff's tenure committee is the same individual who headed a committee that resulted in Rob Precht, an openly gay administrator, being terminated, and given all the evidence respecting Friedman, Schneider, Logue, Clark, Lehman, Miller and Hertzog, there are ample areas of disputed evidence which should not be resolved on a motion for summary disposition and that go to the heart of the motivation of enough of the "no" voters to place in issue whether or not Plaintiff would have prevailed on the tenure vote had he had not been discriminated against. Hammer's testimony concerning the atmosphere is validated by the University's own study attached as Exhibit 29. For those reasons summary disposition should be denied on Count I of Plaintiff's complaint.

Before closing on the issue, however, some response to the defendant's new-found argument that this court must defer to the university on tenure decisions is in order. Aside from the fact that not a single case relied upon by defendant has the statutory framework that exists in Michigan the cases relied upon are simply inapposite. None depend on a contractual theory as does the case at bar. None sought only to disqualify the bigoted vote as a remedy as does the case at bar. Each sought to question the merits of the tenure decision at issue, unlike the case at bar. None involved the denial of tenure by a minority of bigots in the face of a majority vote that favored tenure. None were supported by the defense with false swearing, as in the case at bar. None involved a statute that specifically ceded to the court jurisdiction of

colleges and universities in the same manner and to the same degree as the Elliott Larsen Civil Rights Act, MCLA 37.2001 et seq.

Of particular note, however, is the fact that even those cases that defendant relies upon make clear that the deferral to academia is premised upon the availability to a strenuous and available grievance process – something that was wholly lacking to Hammer. In point of fact, the principles announced in the cases relied upon by defendant urge this court's review of the decision at issue. In *Dobbs-Weinstein v. Vanderbilt*, 185 F.3d 542 (6<sup>th</sup> Cir. 1999) the court did not have to determine whether tenure was appropriate for Plaintiff because the grievance process available to that plaintiff resulted in her being awarded tenure. Understandably, the court ultimately held that Plaintiff had not suffered an adverse employment action. The court stressed that due to the complexity of tenure decisions, ". . . universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process." (*Id. at 545*) Hammer of course had no grievance process available to him. The law school – unlike the remainder of the university and theoretically a bastion of due process – specifically denies access to the grievance process to review tenure decisions or anything remotely related to it. Now it is saying to the court what it said to Hammer: "Trust us." By the duplicity that is rife throughout their writings and testimony, they have certainly not earned that trust.

- II. Summary Disposition of Hammer's claim of detrimental reliance should be denied since the basis for the motion is false.**

Defendant has moved for summary disposition of Count II of Hammer's Complaint based upon its assertion that since all Hammer did was forego other offers to accept UM's offer, that there can be no claim of detrimental reliance. In particular, defendant argues that Hammer had only one offer that provided health care benefits for his domestic partner and therefore, no detrimental reliance claim could be made out. These assertions are palpably false. The legal standards cited by Defendant, however, are accurate.

First, Hammer was still in the process of negotiations with Georgetown Law Center and the UCLA Law School when he decided to accept defendant's offer. Contrary to defendant's assertions, both of those law schools were in the process of finding a job for Hammer's partner so that he would have medical benefits. While it is true that they did not offer coverage for domestic partners under their insurance policies, they were going to provide coverage as an independent employee (Hammer Affidavit).

This is not a case in which Plaintiff claims he can only be terminated for cause because he gave up other offers of employment to accept this one. Indeed the law that applies in such instances does not protect such individuals because they must forego other employment as an incident to accepting defendant's offer. But here, we are dealing with a specific promise of non-discrimination to an individual who is not protected under state and federal anti-discrimination statutes. That is the promise Hammer relied upon, and it now appears, to his detriment. It was not simply a promise of employment, but one to be free from discrimination based on sexual orientation. Hammer was instilled with an expectation that the tenure review process would be fair,

a property interest recognized by our courts, *Purisch v Tennessee Tech. University*, 73 F.3d 1414 (6<sup>th</sup> Cir 1996). He was further induce to give up other employment by assurances that it would be bias free.

According to Hammer it was the repeated assurances that his sexual orientation would not impede his professional progress and in fact would not be used against him in determining his tenure as well as the domestic partnership benefits that ultimately resulted in his accepting employment at the University of Michigan. He quite clearly relied upon these assurances to his detriment if one believes that his sexual orientation played a role in a significant enough number of negative votes to have caused his termination from employment at the University of Michigan Law School. This motion too should be denied.

III. **Defendant's Motion for Summary Disposition of Plaintiff's Claim For De Facto Tenure Is Without Merit**

**Overview**

The Defendant has asserted that the Plaintiff's claim for breach of contract (*de facto* tenure) should fail because the Standard Practice Guide of the University of Michigan is not a contract and does not create contractual rights. A fair reading of Plaintiff's claim however is that he relied on the By-Laws of the Board of Regents of the University of Michigan. By-Laws are not the same as the Standard Practice Guide nor do they have the same purpose. They are tantamount to ordinances passed by a body politic. The Standard Practice Guide may delineate the process for implementing the By-Laws, but it cannot change or diminish rights provided in the By-Laws.

Defendant misconstrues the allegations as set forth in the Complaint in order to create an argument for dismissal. The minutes of the meeting of the Board of Regents of the University of Michigan for July 2003 shows that the Board was not advised that the Plaintiff was terminated but rather was advised that he had resigned his employment (Exhibit 26). One must wonder whether the Board of Regents was misinformed that Hammer had resigned in order to avoid the implications of Regent By-Law 5.09, which would have required a hearing as had been demanded by Hammer in January of 2003.

By-Law 5.09 requires that the procedures set forth be followed "before recommendation is made to the Board of Regents of dismissal, demotion, or terminal employment of a teaching staff member holding appointments with the University for a total of eight years in the rank of full time instructor or higher." (Exhibit 16 at page 4) Here, rather than instituting the hearing required under 5.09 for Hammer, the Law School simply misinformed the Board of Regents of the University of Michigan that Hammer had resigned and thus avoided the requirements of By-Law 5.09. If anything, summary disposition in favor of Hammer and against the University would be appropriate on this claim.

There is no genuine issue but that Peter Hammer taught for eight years nor is there any genuine issue of fact that Hammer requested a hearing be held pursuant to Regent By Law 5.09 (Exhibit 27). The sole issues to be determined by this Court, either on motion or at trial, are whether certain leaves of absence taken by Hammer during his eight years at the University of Michigan should be considered as part of his accrued time or should be deducted from the eight years in question and whether a notice of

non-reappointment provided to Hammer in the year 2000 which did not reference the academic year 2002-2003 as his terminal year, but rather the year 2001-2002 as his terminal year, is adequate notice to bar application of the so-called *de facto* tenure rule. While defendant argues that one must serve for 8 years without interruption before one is entitled to be protected under the Regent By-Law, the requirement is that one "hold appointment" for 8 years – a requirement that Hammer satisfied.

What facts do the record bear out? Plaintiff was hired in the May of 1995 by the University of Michigan Law School. Plaintiff commenced his employment at the University of Michigan as a tenure track associate professor and in the year 2000 was first considered for tenure. At that time no vote was taken on whether he would be granted tenure or not by the tenure faculty in accordance with its normal procedure. Instead, the decision on whether to grant or deny tenure was deferred for a period of two years. At that time, Dean Jeffrey Lehman wrote to the Plaintiff advising him of the decision to defer the vote on tenure until 2002 and also indicating to him that in the event that vote was unsuccessful that that year (2001-2002 academic year) would be his final or terminal year of employment at the University of Michigan. After a subsequent exchange of e-mails between the Plaintiff and Jeff Lehman, an additional one year contract was awarded to him in the year 2000. In other words, despite the fact that his tenure vote would occur in the beginning of 2002, his employment would continue through the Spring of 2003.

Ultimately, Plaintiff was denied tenure by a vote of the faculty in late February of 2002 and there was then some communication between the Plaintiff, Jeff Lehman and Evan Carminker respecting whether or not the Plaintiff would teach the following year.

An exchange of e-mail between Caminker and Lehman disclosed that Caminker was surprised when he learned that Hammer was going to teach in the 2002 and 2003 academic year.

By the Spring of 2002 Caminker became concerned that the teaching activities by Hammer in the 2002 and 2003 year might trigger the *de facto* tenure rule and inquired of the Provost's Office as to the application of that rule. Jeff Frumkin, one of the Associate Provosts, responded to that inquiry and according to Frumkin indicated that notice had to be given of the terminal nature of the following year's contract by September 15, 2002 (Frumkin at pp. 20-21). The conversation began when Frumkin was contacted by Evan Caminker (Frumkin at p. 21). According to Frumkin it is a part of the University policy to let non-tenure faculty have nine months' notice termination (p. 22). Failure to do so allowing a faculty member to accrue 8 years of service without proper notice implicates what is known as the *de facto* tenure rule (p. 22). The rule provides that a person not receiving such notice is given the protection of Regent By-Law 5.09 (p. 23). One protected by Regent By-Law 5.09 can only be terminated for cause (p. 24).

There was also a subsequent conversation with Caminker in the Fall of 2003 on that same topic. That was initiated by Evan Caminker at which time

"He indicated that he had not met the time line with respect -- the rules of the standard practice guide and we discussed where we were at with respect to that -- to that issue. We sought advice and counsel from the General Counsel's Office about that . . ."

(Frumkin pp. 24-25)

In his conversation with Caminker before the General Counsel was consulted

Frumkin testified "[i]t was clear that he had not sent the letter by September 15. I hadn't concluded anything beyond that." (Id. at 25) Ultimately Frumkin concluded that appropriate notice had been given albeit the notice in question was the February 28, 2000 Lehman letter (Id. at 43). The first conversation regarding whether or not notice had to be given on or before September 15, 2002 occurred at least a few months prior to that date (Id. at 29). In his initial conversation with Caminker he told him to just give notice (Id. at 30).

Frumkin was questioned regarding whether or not the letter that had been written to Hammer conditionally advising him that his terminal year would be the year 2001-2002 in the event of an unsuccessful tenure vote and indicated that was the letter that he relied upon in his conclusion that adequate notice of terminal year had been given. However, this testimony ignored the fact that the year 2001-2002 was not Hammer's terminal year. In point of fact, Hammer taught during the 2002-2003 academic year and in addition continued to work with the Law School, the Provost's Office and certain other colleges within the University to find other suitable placement for Hammer so that his employment could continue at the University. Frumkin testified that the letter in question was adequate notice of terminal year without knowing what his last year of service was (Id. at 46).

According to Frumkin the purpose of the notice "is to provide adequate notice to the eligible faculty member covered by the policy that their appointment at the University is going to terminate at a date specific." (Id. at 42) There is no genuine issue of fact that in the Fall and Winter of 2002 and 2003 Hammer continued to explore teaching possibilities within the University in which he could teach both at the Law School and

elsewhere and was being encouraged in that endeavor by Dean Lehman and the Provost's office.

**1. Plaintiff was an Employee Who Could Only Be Terminated For Cause Following the Hearing Pursuant to By-Law 5.09 of the Board of Regents of the University of Michigan**

Defendant argues that the Standard Practice Guide of the University of Michigan does not form a contract between the parties. Plaintiff's complaint carefully delineates the fact he acquired what is known as *de facto* tenure, or, protection of Regents By-Law 5.09 which converted him from an at-will employee to one who could only be terminated for cause following a hearing. Plaintiff was not terminated for cause nor was he provided a hearing as required by the By-Law. Neither of those issues seem to be addressed by the Defendant, at least directly

The unconverted testimony both of Plaintiff and Jeff Frumkin, the Associate Vice Provost, is that the policy of the University is to provide "for cause" protection from termination whether or not a faculty member is tenured as long as they have taught for eight years without being provided the appropriate nine month notice of terminal year and non-reappointment.

**2. There is No Genuine Issue of Fact that Defendant Failed to Give Notice of Terminal Year Pursuant to the Policies of the University of Michigan**

The purpose for notice of non-reappointment is to provide adequate notice to a faculty member (at least nine months) that their employment will not continue beyond the current year's appointment so that the faculty member will have adequate time to

seek employment elsewhere. As stated by the Associate Vice Provost, Jeff Frumkin, it is to provide adequate notice that the employment relationship with the University is going to terminate.

What the Defendant seems to argue is that if you at any time give notice of a terminal year, even if that is not the correct terminal year such notice is adequate. Hammer continued to work with the University (including the Dean of the Law School) to find other placement within the University even after the year 2002-2003 began and well after the vote of the tenure faculty denying him tenure (Lehman pp. 55, 79). He likewise pursued other avenues of recourse including the grievance mechanism that ultimately was denied to him and a provostial review which turned out to be both spurious and tainted by one of the Plaintiff's protagonists.

While the Defendant refers to a September 5, 2002 communication from Lehman to the Plaintiff (p. 17 of their brief) offering his assistance in Hammer's "... [exploring] possible opportunities for next academic year" as evidence that Hammer knew he was leaving the University's employ, this was in reality a reference to the fact that Hammer was continuing to look for collaborative work within the University where he could teach and write while working both within the Law School and elsewhere in other colleges within the University where his expertise was quite welcome. While the Defendant concludes that those events should have confirmed to Hammer that he had no "legitimate expectations" for continued employment, the claim at issue is not one dealing with expectations but rather contractual rights as awarded to Hammer under the Regents' By-Law 5.09. Moreover, the assertion is factually inaccurate because Hammer was at all times through the Fall and early Winter of 2002 and 2003 hopeful

that his employment would continued at the University of Michigan through the efforts of the Provosts' office, Dean Lehman and other faculty members who were very supportive of his search for other employment at the University.

While Plaintiff accepted other employment so that he had a safety net, that does not obviate the need for the University to conduct a hearing pursuant to Regent By-Law 5.09. The fact that Hammer attempted to mitigate his damages by seeking and obtaining other employment does not defeat the claim that he was improperly terminated. The issue isn't whether Hammer obtained employment three and one-half months after the expiration of the period in which he was to be given notice of terminal year. The issue is whether or not notice of terminal year as required by the standard practice guide and the Regent's By-Laws was provided prior to September 15, 2002 and if it wasn't, whether a hearing was held to determine that there was cause for termination at some time thereafter. The answer to those two questions are emphatically and without any issue of fact "No."

**3. Defendant's Assertion that Plaintiff Should Be Estopped from Asserting this Claim is Without Merit**

Defendant argues that the Plaintiff should be estopped from claiming that he had *de facto* tenure and was entitled to the protection of By Law 5.09 because three years prior to the University's denying to him this protection he had asked for an additional one year's employment contract at a time approximately two years prior to the denial of tenure. It is difficult to understand the Defendant's argument because it seems to be premised upon the fact that the Defendant failed to give the requisite notice of terminal

year because it believed that Hammer already knew that the additional year's contract he requested was the terminal year. It would seem to any reasonable reader that the Defendant is now conceding that appropriate notice wasn't given under the rule however it now blames the Plaintiff for the failure to give that notice despite the fact that the Associate Dean of the Law School (then Evan Caminker) had at least two conversations involving the Vice Provost (Jeff Frumkin) and the General Counsel's Office (Dan Sharphorn) in which it was concluded that notice had to be given prior to September 15, 2002. And so now it argues that it relied on the Plaintiff and the fact that Plaintiff had requested an additional final year of contract earlier rather than relying on its own counsel and its own Vice Provost who gave it advice to the contrary.

What seems quite clear however is that no one anticipated that the 2002-2003 year was going to be the final year of employment by Hammer at the University. Lehman and the Provost's Office were both offering assistance in his effort to obtain other employment at the University. Hammer's efforts were ongoing at the University through the early part of 2003 in an effort to find other employment. Hammer was challenging the tenure decision both through the Provost's Office and through a grievance mechanism.

Had the University believed the argument now posed by counsel, then Evan Caminker would not, in the Spring of 2002, have been asking the Provost's Office about *de facto* tenure and the Provost's Office would not in the Spring and several months later be advising Caminker to send notice of terminal year to Hammer and to do so by September 15, 2002. Hammer did not induce the Defendant not to send notice of terminal year. Defendant apparently neglected to do so despite twice being told it was

required by the Provost's Office. It then apparently misled the Provost's Office into believing that a conditional February 28, 2000 letter was adequate notice of terminal year despite the fact that it did not address the year in question and was given long prior to the time at issue. If anything it would be iniquitous to apply the doctrine of equitable estoppel where it did not mislead the Defendant in any fashion at least with respect to the notice of non-renewal.

**4. Hammer Did Acquire Eight Years of Service For Purposes of the Rule**

Defendant moves for summary disposition asserting that Plaintiff did not acquire eight years of service because he had leaves of absence in 1998 and the Fall of 2000 during which he had no work duties. This perception is incorrect. He may not have had teaching responsibilities but he was on campus, available to students and writing during those periods of time. In point of fact Hammer was entitled to a mid-term sabbatical and an annual sabbatical and took both of them. Neither "stops the clock" according to the SPG sections cited to the court by the defendant. Hammer was "in residence" during his time off. This does not result in the clock stopping according to the SPG. Hammer's research grant and the work performed on it does not stop the clock under the SPG.

The exhibit attached to Defendant's brief is the Standard Practice Guide section respecting the rules for acquiring eight years of full-time regular instructional staff appointments at the University of Michigan. It requires under subparagraph 1 that the appointment must be for instructional staff. Hammer's appointment at all times was for instructional staff. Under subparagraph 2 it does not permit anything other than full-time appointments to be counted towards the acquisition of the requisite eight years. At all

times material Hammer's appointment was a full-time appointment. Under subparagraph 3 it requires that the appointment must be spent in residence at the University of Michigan or on paid duty off campus or on sabbatical or scholarly leaves (as defined elsewhere) and provides that time spent on other scholarly leaves may be counted provided the individual and the University agree in writing at the time the leave is granted and such agreement is approved in writing by the Office of the Provost and the Executive Vice President for Academic Affairs. Since Plaintiff's entire tenure was in residence at the University of Michigan the remaining proviso's not apply to him. Two of the leaves were sabbatical leaves. The last leave was a research leave for less than one year. In point of fact, none of the leave time granted to Hammer ever stopped his tenure clock. Moreover, if one were to apply equitable estoppel principles it would seem like this was the ideal place in which to do so. In each instance where Plaintiff was placed on leave he was invited to do so by e-mail coming from the Dean's office.

During Hammer's tenure he was invited to take sabbatical leaves where he would be relieved of his teaching responsibility for short periods of time in which to do scholarly research and writing. In fact, the earliest leave that he was entitled to (1998) was mentioned to him in his initial offer. The process was for the Dean's office to notify the Plaintiff when he was eligible for leaves and invite him to take those leaves. Plaintiff indeed took advantage of them and each leave was approved by the Dean's office. It was not incumbent upon the Plaintiff but rather upon the Dean's office to seek and obtain Provost approval for these leaves. Whether or not that was done is still in issue. There is no testimony denying that the Provost's office approved the leaves. There is testimony however that Dean Lehman approved the leaves. Thus, once again the

Defendant has moved for summary disposition on a basis where the factual evidence is in issue.

Again, of concern to the Plaintiff is that the defendant appears to be engaged in an effort to deliberately mislead the court. It has argued that the By-Laws taken together with the Standard Practice Guide cede to the University the right to interpret these regulations. The law school prevented that from occurring at the university level by rendering all of Hammer's complaints non-grievable. It now seeks to mislead the court by posing arguments that it knows are at odds with the university's own interpretation of these regulations.

Attached as Exhibit 33 are the definitive interpretations of the very guidelines at issue in this case. While they were not promulgated until April 20, 2005, some three years after Hammer was denied tenure, they are nonetheless the interpretive guidelines of the very same issues posed here and are governed by the exact SPG provisions and By-Laws. As is made clear on Page 4 of the exhibit, the clock runs unless the dean of the affected school requests the Provost stop the clock for one of the reasons set forth in the SPG. Defendant has argued that the tenure clock stops automatically unless the Provost agrees in writing to the contrary. The Provost's interpretation, however, says the opposite, that is that the clock runs unless the dean requests in writing that the Provost stop the clock. Since defendant acknowledges there is no writing from the Provost affecting the running of Hammer's tenure clock, it must be found that it never stopped.

There is no evidence either that the Provost's office approved or did not approve the leaves in question. If it did not approve the leaves because Dean Lehman failed to

process the paper, this would be appropriate place for the Court to bar a party from raising a defense that it, through its own neglect, created.

**5. The February 2000 Notice Upon Which Defendant Relies is Conditional in Nature and Therefore Does Not Comply With its Own Standard Practice Guide**


Regent By-Law 5.09 essentially provides that a tenured faculty member (or one with *de facto* tenure) may not be terminated from employment at the University without first having a hearing and without a demonstration of cause for such termination. While Defendant points to its February 2000 letter to Peter Hammer advising him of the deferral of the tenure decision to the year 2002 as complying with the Standard Practice Guide requirements of notice of terminal year, such is not the case. Standard Practice Guide 201.88 provides that the notice "... should not be conditional . . . ." In the instant case the notice was clearly conditioned upon the vote for tenure being negative. Thus it does not conform to the requirements of the University's own rules and is does not effective notice of terminal year.

**Conclusion and Prayer for Relief**

From the foregoing discussion it is apparent that factual issues exist with regard to credibility and state of mind and the legal issues raised by the Defendant are not dispositive of any of the claims in this case. For these reasons the Court should deny summary disposition on Defendant's motion. However, Plaintiff invites the Court to grant summary disposition on Count III of Plaintiff's Complaint for reason that there now appears to be no genuine issue as to any material fact and given the discussion above, it appears that Plaintiff, not Defendant, is entitled to a judgment as a matter of law.

Respectfully submitted

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

By:   
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Attorney for Plaintiff

Dated: June <sup>20<sup>th</sup></sup>, 2006

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

Peter J. Hammer,

Plaintiff

vs.

Case # 04-241 MK  
Hon. James R. Giddings

Board of Regents of the University  
of Michigan,

Defendant

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**PROOF OF SERVICE**

Anna Gebstadt, affirmatively states that on June 21, 2006, she served a copy of **Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition** and this **Proof of Service** on Mr. Richard J. Seryak, 150 W. Jefferson, Suite 2500, Detroit, MI 48226 by enclosing the same via DHL overnight service.

**My signature serves as my oath and affirmation.**

  
Anna Gebstadt