

APPENDIX ON CREDIBILITY

As will be demonstrated several of the tenured faculty members who voted against tenure for Peter Hammer in the year 2002, (decision-makers on the ultimate decision to terminate his employment) have testified at odds with one another, at odds with documents produced during discovery and at odds with private discovery to such an extent that the credibility of more than half of those voting against tenure is an issue, and in at least four instances, the credibility issue goes to the heart of whether or not the individuals in question were predisposed to discriminate against Peter Hammer because of his sexual orientation.

The credibility issues fall into two categories. One deals with the basis for the opinion that the Plaintiff's work was not sufficiently scholarly to warrant an award of tenure. The other deals with whether or not the individual in question was motivated by considerations of Plaintiff's sexual orientation. Typical of the former would be the testimony of Richard Friedman who, according to several other individuals, spoke out against tenure for Peter Hammer at the tenure meetings (e.g., Miller 12-13).

Richard Friedman acknowledged that he is not an expert in the area of antitrust law nor is he an economist (Dep. 10-12). Friedman's written communications that Hammer is an expert in antitrust (Exhibit 2) and he testified that Hammer is an economist, having a PhD in economics (Hammer Dep. p12). And so our starting point for the analysis of Richard Friedman's testimony is that Peter Hammer held a degree and was expert in the affected areas of his scholarship in ways that Friedman lacked. On the eve of the meeting at which the vote was taken, some week or so after

Friedman admittedly spoke out against tenure for Peter Hammer (Dep. p12), Friedman e-mailed Hammer wishing him "good luck tonight" (Friedman deposition Exhibit 4). Moments later, Friedman was speaking out against the grant of tenure for Hammer and apparently in doing so in a way that resonated with some of the minority of colleagues who opposed tenure. While Friedman acknowledged that Tom Kauper would be the expert in Hammer's area, he conveniently interpreted Kauper's pre-tenure remarks to be cool with respect to the recommendation of tenure (dep. p 23). This stands in contrast to Kauper's statement that he was surprised by the denial of tenure. (Kauper Dep. 22). Perhaps what stands in greatest contrast to Friedman's testimony was an e-mail he sent in April of 2002 approximately two months following the denial of tenure in which he (Friedman) wrote to certain faculty with whom he had been acquainted at Ohio State University to support Hammer's endeavor to obtain employment there (Friedman dep. p7). Friedman, while acknowledging that tenure had been denied, stated as follows:

"He's a terrific guy and an excellent colleague. I can't say much about the tenure denial but it isn't telling tales out of school to say this much: we look at scholarship, teaching and service. His service has been obviously exemplary and extraordinary, most notably the founding of a legal services program for Cambodia. His teaching is universally regarded as terrific; he has, I believe, won two teaching awards."

In his deposition testimony however, Friedman tried to soften the description of Hammer indicating that perhaps Hammer was not "universally" regarded as "terrific" and perhaps "terrific" wasn't the right word (Dep. transcript 43). He concluded the description of Hammer by saying "[b]ut he is clearly a leader, and a mover and shaker,

in the field of health care law. He is getting all sorts of fancy invitations, and he has become quite productive." In his deposition testimony he does not indicate that Hammer is a leader, or a mover or shaker in health care law but rather indicates to the contrary that he had concerns about Hammer's capacity to become a leader in his area.

And so we are faced with a witness who testified in deposition that he voted against tenure because Hammer did not have the capacity to become a leader in his area and yet two months later wrote to colleagues at another university indicating just the opposite. We have an individual who on the eve of the vote is wishing Hammer "good luck" (perhaps leading him to believe that he had his support) and leading the charge against him at the time of the meeting. Most notably this is one of the individuals who was on the committee appointed to assist Hammer in further developing his writing skills between 2000 and 2002 and acknowledged that he had from time to time reviewed and critiqued Hammer's work (Dep. Transcript pp. 12-13). Friedman is only one of several however.

Don Herzog, another tenured faculty member who voted against tenure for Hammer is an interesting case study. Herzog has no formal legal training, did not attend law school, is not a licensed attorney and yet is a faculty member at the University of Michigan Law School (Dep. p. 3). Herzog voted against tenure and is recorded in the notes maintained of the tenure meeting as indicating he was not moved at all by what the reviewers had to say concerning tenure (dep. p 8). The articles that were written were not in any area of expertise for this particular witness (dep. p 9). This particular witness was moved by the written dissent of J. J. White, a memo of Sally Ann Payton and the oral statements of Richard Friedman (dep. pp 10-11). The witness

identified Tom Kauper as the most senior antitrust person on faculty (dep. pp 14-15). The witness indicated that he was present when Kauper spoke during the 2002 tenure meetings (p. 15). He testified further when asked whether or not Kauper spoke favorably on the tenure application as follows:

“My impression of Tom was that he was not going to tell us that he thought that Peter’s case was weak, but that it was not a vigorous, enthusiastic, unconditional, hearty approval.” (Dep. p 15).

When asked whether in his speech Kauper indicated that he was in favor of tenure for Peter Hammer the witness stated:

“I think he formally stated a positive bottom line but it struck me as not a hearty endorsement. And given that Tom was not just the senior person in the field, but Peter’s teacher it’s an awkward position for him to be in. And what’s striking is when somebody doesn’t say ‘this is clearly, clearly someone who ought to be promoted. Here’s why.’” (Dep. p.15)

When asked whether Kauper did a written review, the witness stated he did not recall (Dep. p16). What the court needs to know is that Tom Kauper was not present at the tenure meeting but was rather teaching in Harvard at the time and did not return for the meeting (Kauper dep. at page 6). Additionally, Kauper wrote four different reviews of Peter Hammer’s written work, one in 1998, one in 2000 and two in 2002 (see Kauper reviews, attached).

Herzog thus, when confronted with the fact that the senior antitrust expert on faculty may well have been at odds with Herzog’s opinion, decided to marginalize his opinions by attributing to him a statement that he could then pick apart. This was a fantasy because no statement was made by Thomas Kauper nor could one have been

given since Kauper was not present. It also shows that Herzog disregarded four positive written evaluations, one of which critiqued the two negative reviews done of Plaintiff's work in arriving at his decision. But as credibility goes, these failings were minor compared to some of their colleagues.

For example, Carl Schneider, who voted against the Plaintiff, maintained repeatedly that he had not worked through the issue of whether or not he opposed same sex marriage rights. When asked whether he opposed same sex marriage rights he answered "no", and when asked if he supported the legality of same sex marriage rights he stated "no". He explained the ostensible inconsistency as follows: "[y]ou asked me whether I believe something, and I don't believe that because I have not worked through my thoughts enough to have an opinion one way or the other." (Dep. pp. 23-25) and later stated "[m]y answer is, I don't have a belief because I can't reach a belief until I've thought it through, so" (Dep. p25-26). This testimony on Schneider's part stands in contrast to the numerous articles and books that have been authored by him in which he quite clearly has thought of the subject and developed a firm opinion which is that same sex marriages should not be legalized (see attachments from various publications by Schneider). Schneider, when pressed on these issues, stated "[w]ell, I stopped teaching family law 10 or 15 years ago, and I almost never write in the area anymore. And I'm not sure that I would describe myself as an expert in a field where I don't write." (Dep. p.29) Schneider apparently forgot at the time of his deposition that in the year 2005 he was a member of the Council on Family Law (see attached Exhibit 21 at page 4) and in that capacity he was one of a number "experts" who subscribed to a publication titled "The Future of Family Law: Law and Marriage

Crisis in North America.” This was a joint report from the Council on Family Law and in it that organization, and apparently Schneider, clearly oppose same sex marriage based upon stereotypical views of gay and lesbian couples (see report of pp 15-26). The report further indicates that the recognition of same sex marriages “. . . will place the law in a stance that is hostile towards cultural and religious communities that adhere to the ethos of conjugal marriages as the backbone of their communal life.” (Exhibit 21 at p.27). Perhaps most telling is the section titled “Conclusion”. Starting on page 40, the group observes “[m]arriage is the complex cultural site for opposite-sex bonding. A rich heritage of symbols, myths, theologies, traditions, poetry, and art has clustered around the marital bond. To change the core features of marriage is to impact real people, adults and children, whose lives will be significantly shaped by the renewal or decline of this institution.” Apparently, gay and lesbian couples are not real people whose lives might be shaped by the availability to them of the marriage institution. The report goes on in its conclusion “the complex social institution of marriage does require ongoing change to sustain and enrich its development. But the well-being of children, parents, couples, and society is seriously threatened by the push to ‘de-normalize’ the core features of marriage and parenthood and to strip their historic public meaning from the law and the public discourse.” (p.40) According to the report “[marriage] addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a unique form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance.” [Exhibit 21 at 40]. It is interesting that the report in no way

describes how same sex-marriages do not fit within this description and indeed the relationship of Brodie and Schacter discussed in Hammer's affidavit would clearly fall within the description stated here. If marriage promotes those elements listed above, why is it then that gay and lesbian couples should not be allowed to engage in a relationship that integrates their sexual attraction, their interpersonal love and commitment, their childbirth and child care and socialization as well their mutual economic and psychological assistance. Nowhere in the report is that explained. When one reads the conclusion section of this report one cannot help but walk away with the feeling that the conclusion is driven by conservative religious forces in our society. Thus, the ultimate recommendation that a minimum five year moratorium should be placed on any changes to the law affecting the definition of marriage does not come as a surprise (Exh. 21 at 42). And so it is quite clear that Mr. Schneider had thought long and hard about the issue of same sex marriage and was not forthright in his testimony about whether or not he worked through an answer, whether or not he was expert in the area and one then must wonder, whether or not seeing Peter Hammer and his partner and their extended families' children at law school functions did not weigh into his opinion concerning Peter Hammer's ultimate tenure denial.

Steven Croley, who is now one of the Associate Deans and attended many of the depositions, testified as to his reasons for voting against tenure and since his deposition was near the end of all of the depositions one might suggest he knew where the pitfalls were of certain opinions and knew how to avoid them. Mr. Croley is good friends with Kyle Logue who will be discussed later. He indicated that he voted against tenure because of Peter Hammer's scholarship. When asked why the Law School

sends out a faculty directory that includes the names and ages of children Mr. Croley was unable to give a reason for it (p. 10). He does recall seeing Peter Hammer at some Law School events with his "kids" (p. 11) and he remembers one occasion that he first described as being at Nick Rine's home (p. 11) and then described as being at Deborah Malomud's home (p. 12) in which Hammer's children and Croley's children were in attendance. According to Croley he suggested that his children go and play with Hammer's children (p. 11). However, Croley says, "they couldn't communicate very well; that is, they were English speakers and Cambodian speakers." (P. 11-12). This remark shows a little different bias and as can be seen by Hammer's affidavit, his children from his extended family are English speakers; some have graduated from public school in the City of Ann Arbor and three are attending college while of the remaining two, one was two years old when the child moved to the United States and the other was born in the United States and all of the children speak fluent English.

William Miller, a faculty member who has written a book titled "Faking it" has referred to homosexuality or homosexuals as a "pariah group" (p. 32) . He also referred to homosexuals as being perceived as having low status (p. 23-25). He was questioned about whether or not homosexuality was discussed at the tenure meetings and indicated it was not (p. 32) and then was asked whether he had ever discussed Peter Hammer's homosexuality with anyone and indicated only with him (p. 33). When questioned about when that conversation took place, Miller said "[w]ell, it was during his job interview when we took him out to dinner. He mentioned to us that he was gay and we had a very interesting discussion about him and his various commitments." (P. 33). He then indicated that he had voted to hire Hammer knowing that he was gay. (P. 33).

This testimony is false because Hammer did not "come out", so to speak, or reveal the fact that he was gay until after he had received an offer of employment. (See Hammer Affidavit.) And so we have an individual who has authored books referring to homosexuals as pariah group members and people of low status attempting to show that he did not share those opinions because he voted to hire Hammer when he knew Hammer was gay. This latter statement of course was false and so Miller's credibility is in issue on the very issue at stake in this litigation, namely, whether or not he held an anti-gay animosity.

Jeff Lehman, former Dean of the University of Michigan Law School and thereafter President of Cornell University, was an interesting case study and credibility. Mr. Lehman is now a tenured law professor at Cornell University. He accepted the position at Cornell within a year following the denial of tenure to Peter Hammer and within two years thereafter stepped down as the President of the Cornell to take a tenured faculty position as a law professor. Lehman's duplicity can be seen in the first issue raised by defense counsel in examining Lehman. Defense counsel carefully took Lehman through certain leaves of absence the Plaintiff had enjoyed during his employment at the University of Michigan Law School and indicated that those leaves should have been deducted from the time that he spent at the University in calculating whether or not he had acquired eight years of continual service to be entitled to de facto tenure. On cross examination however, it appeared that Mr. Lehman himself had approved each of the leaves in question. (Dep. 22-23). He had approved them to do scholarly research. (Dep. 23-24). Indeed, one of the leaves had been described in the employment letter initially sent to the Plaintiff. He was unaware whether or not the

Plaintiff continued to attend faculty meetings during those leaves of absence. (Dep. 26-27). And so Plaintiff who has done everything required of him to request and receive a leave to do scholarly research continues to serve on behalf of the University in that capacity as well as a faculty member during certain discrete periods of time and yet is now denied credit for those research leaves apparently because Mr. Lehman himself failed to forward the requests for scholarly research leaves to the Provost to obtain provostial approval for the same. Despite the lack of provostial approval Mr. Hammer enjoyed those leaves of absence and received his full salary and fringe benefits (Dep. 24). Mr. Lehman appeared to be the type of witness who was unabashed in answering questions in a manner that placed himself in the best possible light. Mr. Lehman was asked whether or not he had been in his professional career been accused of being homophobic and responded that he had not (p. 30). He was then questioned about whether or not he was familiar with the Cornell Daily Sun, a student newspaper and whether he had read it during the period of time that he was President at Cornell. After indicating that he had read at times (pp 30-31) he changed his answer. Apparently having been apprised of the fact that counsel for the Plaintiff was aware of certain publications in the Cornell Daily Sun that accused Lehman of being homophobic (see attached articles) he then changed his answer and indicated that he in fact had been accused of being homophobic. This was not a trivial issue but one that went to the heart of his motivation. He acknowledged that the impetus for those articles was his refusal to ban army recruiters for reason that he did not wish to lose federal funding. The army, of course, discriminated against gays in the military at that time. Lehman attempted to pass the buck indicating that the decision actually wasn't his but was

probably the decision of the vice-president for student services (pp. 32-33) but then acknowledged that was someone who reported to him and whose decision he could probably could overturn but did not do so (p. 33). He acknowledged that one of the reasons that he failed to overturn the decision was that he would have jeopardized certain federal funding that Cornell enjoyed (p. 33). While Lehman acknowledges having communication with Hammer through the Summer and Fall of 2002 after Hammer was denied tenure and acknowledges Hammer raising the issue of discrimination Lehman indicated that he did recall Hammer raising the topic of discrimination and that he requested Hammer to provide him with information regarding his claim of discrimination. When shown his actual communication with Hammer he had to acknowledge that he never specifically asked Hammer to provide information concerning his discrimination claim but rather simply asked Hammer to meet with him (Lehman and Evan Caminker)(p.40). Interestingly, in sending Hammer a July 22, 2002 e-mail Lehman stated to Hammer that he did not believe his discrimination claims were well founded and he acknowledged having been made that statement despite the fact that Hammer had not yet provided him with information concerning the basis for his belief that he had been a victim of discrimination (Transcript p. 41). While early in his testimony Lehman testified that he was unaware of the claim of discrimination until the Fall of 2002 (at the time would have been filing his grievance), much the same as certain other answers he gave he had to again amend his answer and acknowledge that he was at least aware that by May 30 after having been shown an e-mail which raised that very topic (Transcript p. 53). Lehman in November of 2002 in an exchange of e-mails with the Plaintiff attempted to describe how it came about that the terminal

year identified in the February 28, 2000 letter that he had sent to Hammer describing the deferral of the tenure decision ultimately was changed so that Hammer was then allowed to teach for the year 2002 and 2003. In his e-mail to Hammer in November of 2002 after having referred to the earlier letter Lehman wrote: "Notwithstanding this arrangement after the final faculty decision in February 2002 I made a discretionary decision to offer you an appointment for one additional year, meaning the 2002 and 2003 academic term." (see dep. pp78-79 as well as Lehman Exhibit 22). Lehman had to acknowledge that that was not accurate. In his November 2002 e-mail he further wrote "this offer was not required by University policy and it went beyond the terms of our February understanding. My intention was to facilitate your smooth transition to another academic unit or University." That portion of the e-mail he indicated was partly accurate and partly inaccurate. In point of fact, the contract for 2002 and 2001 was the result of an exchange of e-mail Hammer and Lehman that occurred approximately a year and half before Hammer was denied tenure. Again, this raises serious credibility issues on the part of Lehman. Since Lehman is the individual who wrote to the Provost misinforming the Provost of the position of the tenured faculty and not informing the Provost that he, Lehman, had voted against tenure, and since Lehman claims to have had nothing to do with the Provost review and yet the Provost indicated that he spoke with Lehman on a couple of occasions regarding the same, Lehman's credibility is in issue and since he is the only person accused publicly of having been homophobic it would seem his credibility gap is quite significant.