

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

PETER J. HAMMER

Plaintiff,

Case No. 04-241 MK

v.

Hon. James R. Giddings

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

Defendant.

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**BRIEF IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY  
DISPOSITION ON COUNTS I AND II OF PLAINTIFF'S COMPLAINT**

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## I. INTRODUCTION

On remand from the Michigan Court of Appeals and pursuant to this Court's Order, Defendant hereby files its Amended Motion for Partial Summary Disposition On Counts I and II Of Plaintiff's Complaint pursuant to MCR 2.116(C)(10). The undisputed facts show there is no genuine issue of material fact for trial and Plaintiff's Complaint should be dismissed.

This case arises out of the denial of Peter Hammer's application for tenure at the University of Michigan Law School. Hammer was first evaluated for tenure in the normal course in 2000. When the Law School faculty did not recommend tenure in 2000, they afforded him a second tenure review in 2002. In both instances, Hammer failed to receive favorable support from two-thirds of the tenured faculty participating in the decision which was needed for a tenure recommendation to the Board of Regents. Hammer makes no claim that there were any procedural defects in the way in which his tenure file was evaluated or how the tenure committees performed their functions. In both reviews, Hammer did not receive tenure because his written scholarship did not satisfy the standards of the Law School.

Count I of his Complaint alleges that Hammer had a "reasonable expectation" that he would not be discriminated against on the basis of his sexual orientation and that he was denied tenure in violation of the University's nondiscrimination policy. Count II alleges that Hammer relied to his detriment in accepting a faculty position at Michigan in 1995 when he had offers from other law schools. Count III (Breach of Contract) is the subject of an independent cross motion for partial summary disposition.

Following eleven months of discovery and 23 depositions taken by Plaintiff, the University filed its motion for summary disposition and a motion for reconsideration urging the Court of Claims to dismiss Hammer's complaint on the basis that no genuine issues of fact remained for trial. The Court of Claims granted summary disposition on Hammer's breach of contract claim to tenure but denied summary disposition on Hammer's claim that the University

violated Hammer's "reasonable expectation" that he would not be denied tenure because of his sexual orientation. Following an interlocutory appeal, the Court of Appeals vacated this Court's prior orders denying summary disposition and remanded the case. In so doing, the Court of Appeals also instructed that the Court of Claims must strike any inadmissible portions of affidavits submitted by Plaintiff which contained opinion, hearsay or averments not based upon personal knowledge. Following a status conference with this Court, the Court permitted two additional depositions. The Court also ordered the University to file a new motion for summary disposition and that if Plaintiff responded to the dispositive motion with a new affidavit or refilled his old one, Defendant could file a motion to strike any portions of the affidavit which violated the Court of Appeals remand order.

Defendant Board of Regents of the University of Michigan now brings this amended motion for partial summary disposition on Counts I and II. The undisputed facts show that the faculty who voted against tenure did so because Hammer's scholarship did not satisfy the standards of the Law School. There were two external reviewers critical of Hammer's work and no evidence that either reviewer had knowledge of Hammer's sexual orientation. Faculty who supported Hammer for tenure confirmed that although there was disagreement over the quality of his work, the faculty vote focused on his scholarship and that his sexual orientation was not a factor in the outcome. One gay faculty member voted against tenure because Hammer's scholarship did not meet the Law School's standards, and at least four other gay faculty explicitly denounced Hammer's claim that the Law School environment was biased against homosexuals. Those who *avored* Hammer for tenure saw no anti-gay bias on the part of any of the voting faculty.

There is no direct or circumstantial evidence that any of the faculty who voted to deny Hammer tenure were predisposed against homosexuals and acted on that predisposition in the evaluation and vote on Hammer's tenure application. Accordingly, Plaintiff has not established

a prima facie case of discrimination. Even if Plaintiff could establish a *prima facie* showing of discrimination, there is no genuine issue of fact for trial that the University had legitimate, nondiscriminatory and nonpretextual reasons for not granting tenure to Mr. Hammer.

## II. STATEMENT OF FACTS

### A. Plaintiff's Hire At the University Of Michigan Law School.

Peter Hammer was hired by the University of Michigan in May, 1995, as a lecturer and appointed an assistant professor at the Law School on September 1, 1995 (Ex. A, B). Participants in the hiring decision, including Law School Dean Jeffrey Lehman, knew or believed Hammer to be gay at the time he was hired (214-215; Ex. C; Lehman 5; Croley II, 5; Miller 33, 37-38).<sup>1</sup> Dean Lehman approved and issued the employment offer which informed Hammer that he would be reviewed for tenure in the fifth or sixth year (Ex. C). After Hammer was hired, Dean Lehman was also responsible along with the faculty for hiring full-time faculty members Jim Hathway, Jane Schacter and Juliet Brodie, all of whom were openly gay (Schacter 26; Brodie 40-41; Hathaway 20-25).

Hammer received the University of Michigan Faculty Handbook for Instructional and Primary Staff (27-29). The Handbook also states that the University:

is committed to a policy of nondiscrimination and equal opportunity for all persons regardless of race, sex, color, religion, creed, national origin or ancestry, age, marital status, sexual orientation, disability, or Vietnam-era veteran status in employment, educational programs and activities and admissions. Inquiries or complaints may be addressed to the University's Executive Director of Human Resources & Affirmative Action, Title IX/Section 504 Coordinator, 4005 Wolverine Tower, Ann Arbor, MI 48109-1281, 313/763-0235, TDD 313/747-1388, FAX 313/763-2891. [Ex. D]

This provision of the Handbook tracks Board of Regents By-law 14.06. Hammer claims that he had a "reasonable expectation" to be treated without discrimination based upon

<sup>1</sup> Unless otherwise specified by name, page references are to the deposition testimony of Peter Hammer. Other citations are to exhibits attached.

his sexual preference and that this expectation was violated when he was denied tenure at the Law School (Complaint ¶ 39).

**B. Plaintiff's Tenure Review in 2000.**

According to written policies of the Law School, faculty typically are considered for tenure in the fifth year of their employment (Ex. E). The candidate must meet the standards of the Law School for teaching, service and scholarship (Howse II, 20-21). The most difficult to satisfy is the scholarship (Lehman 16; Payton 21). The candidate's work must be a significant contribution to legal scholarship, reflecting high intelligence, care and perception (Howse II, 45).

Hammer was considered for tenure in February, 2000 (36-37, 41). A tenure committee reviewed and assessed his teaching, service and scholarship. In a written report, the committee voted 3-2 against recommending Hammer for tenure (59). External review letters were obtained from leading scholars at peer universities to assist the committee and faculty in evaluating the candidate's scholarship (Lehman 14-15). The tenured faculty then met twice in February, 2000, to deliberate and vote on Hammer's case (Lehman 6). Hammer did not receive the support of two-thirds of the tenured faculty participating in the decision, a requirement for tenure under the policies of the Law School (49). The faculty voted, however, to afford him a second tenure review in two years (45, 47, 49-50). The opportunity for a second review with two additional years for the candidate to improve his or her written scholarship was at that time unprecedented (Ex. F; Cooper Affidavit ¶ 4). Hammer understood that he was not granted tenure in 2000, that some of the reviewers were less than enthusiastic about his work and that there were concerns about his writing and projects (47, 57, 61, 63, 65).

**C. Hammer Is Given Unprecedented Assistance In Improving His Scholarly Portfolio For A Second Tenure Review.**

Following the faculty vote in 2000, Dean Lehman issued Hammer a letter confirming that the faculty had concluded that Hammer's research did not support a decision to grant tenure but

was willing to take the then-unprecedented step of deferring his tenure decision for two years to allow Hammer more time to do significant additional writing (Ex. F; Cooper Affidavit ¶ 4). The letter further advised Hammer that the tenure evaluation committee would consider his tenure case again during the 2001-2002 academic year, that internal and external reviews would again be requested, and that an evaluation of his teaching and service would be prepared.

Hammer was given relief from his normal teaching responsibilities in the Fall, 2000, so that he could devote full time to his research (Ex. F; 162-164; Lehman 9-10, 27). Hammer was also afforded a sabbatical leave during the Fall, 2001 term and was assigned to teach only one course (rather than the normal two) in the Winter, 2001 term (Lehman 9-10). A support committee consisting of five faculty members was established to advise Plaintiff on his research, review drafts of his work and provide feedback (165; Lehman 8-9). The creation of this committee to assist Hammer was also unprecedented (Cooper Affidavit, ¶ 5). Hammer can point to no other tenure candidate who was afforded as much reduced-teaching time as Hammer received to prepare a tenure dossier.

**D. Plaintiff's 2002 Tenure Review.**

Law School Professor Rob Howse chaired the evaluation committee for Plaintiff's 2002 review (Howse II, 6). Howse cooperated with Hammer in assembling Hammer's scholarship and obtaining both internal and external reviews (170, 172-173; Ex. G). Howse invited Hammer to identify external reviewers whom Hammer preferred the committee to contact or not to contact. Hammer did not identify any external reviewers whom he preferred the committee not to contact (Howse II, 50-51; Ex. G). The committee members read all of the articles which Hammer submitted (Howse II, 18). Hammer was permitted to respond to negative comments from reviewers before the faculty vote (Howse II, 24; Courant 76). In their report, three

committee members recommended tenure, one member recommended tenure in a separate opinion, and one member dissented (Ex. H).<sup>2</sup>

The Law School tenured faculty met twice in February, 2002, to discuss and deliberate on Hammer's tenure application (Caminker 18; Lehman 18, 41). Each faculty member received Hammer's tenure file, which included his published articles, internal and external review letters, and the tenure committee report (Howse I, 5-7, 9-10). The faculty continued their deliberations and voted at the second meeting on February 28, 2002. The second meeting lasted nearly six hours and deliberations focused on the quality of individual pieces of Plaintiff's scholarship (182; Howse I, 13-14, 20; see also Ex. I, notes of February, 2002 faculty meetings). The discussions were marked by "penetrating criticism" of Hammer's work (Green 35). Of the 32 members present, only 18 voted in favor of tenure, while 14 were not favorable (Complaint ¶ 27; Caminker 43-44; Ex. J). Hammer therefore failed to receive the favorable vote of two-thirds of the participating faculty which is a prerequisite for the Law School to recommend him for tenure (182). After the meeting, Dean Lehman telephoned Hammer at his home to tell him that he had not received the two-thirds faculty support to justify an affirmative recommendation of tenure (182).

**E. Hammer Was Denied Tenure Because of His Scholarship.**

Hammer has no firsthand knowledge about the faculty deliberations, what was said in the faculty meetings, or why faculty voted the way they did (70, 181, 201-202, 204-205, 230-231, 299). Hammer does not know that any faculty considered his sexual orientation in deliberating

<sup>2</sup> The written evaluation of the tenure committee is not binding on the faculty, who are expected to make an independent review of the candidate's scholarship (68-69; Lehman 17-18). The faculty may agree or disagree with the tenure committee's recommendation regarding tenure for the candidate, and it is not uncommon for faculty members to disagree with one another about the significance of certain pieces of a candidate's scholarship (69).

on his tenure application (86). Hammer admits that Associate Dean Evan Caminker summarized for him the concerns voiced at the faculty meeting about his scholarship (197-198, 202).<sup>3</sup>

Disagreement over Hammer's candidacy centered on his research and writing (Howse I, 14). Bruce Frier, who himself is openly gay, voted to deny Hammer tenure based upon Hammer's scholarship (Frier 4-6). David Chambers, also openly gay, voted for Hammer's tenure but told Hammer that the debate over his promotion focused almost entirely on his writing and scholarship (271-272; Chambers Affidavit ¶ 5, 6). Faculty who voted in favor of tenure confirm that nothing was said or occurred during the deliberations to indicate that Hammer's sexual orientation was in any way a factor in the outcome of the vote (Cooper Affidavit ¶ 8; Chambers Affidavit ¶ 5,6; Howse I, 14, 20; Reimann 14, 19-21; Green 18, 20, 22, 28, 34, 37; Payton 13, 21).

Under the Law School's written standards, the candidate's scholarship must demonstrate significant achievement and make a significant contribution to legal scholarship (Ex. E, p. 6). Faculty who voted against tenure did so because Hammer's scholarship did not meet the Law School's minimum standards, Ex. H, Separate View of J.J. White; Caminker 6, 48-50; Herzog 9-11, 18; Logue 8; Clark 13; Ben-Shahar 17, 19; Friedman 17-18, 26-29, 59; Lehman 72-73). Many of the negative voters were influenced by two external review letters, one from Professor Einer Elhauge of Harvard University, who wrote that Hammer's scholarship did not meet Michigan's standards, and one from James Blumstein from Vanderbilt University, who was equivocal as to whether Hammer should receive tenure (See Ex. K; Caminker 9-10; Friedman 26-27; Herzog 10-11; Logue 8-9).

<sup>3</sup> Hammer argues that *after* the 2002 tenure vote, Law School administrators denied him copies of review letters, the identity of the reviewers, and the details of why he was denied tenure and that this "conspiracy" allows an inference of impermissible discrimination. Nowhere does Hammer show that his request for internal and external review letters was handled differently for him than for other tenure candidates. There is no dispute that in this litigation he obtained complete unredacted copies of all review letters and deposed all of the decision makers whom he sought to depose. His pre-suit "discovery" efforts are probative of nothing.

Though he did not participate in the final decision, Professor J.J. White's written dissent focused on Hammer's scholarship and was influenced by Elhauge's review. In contrast to some favorable reviews, which Professor White felt were short and conclusory, Elhauge gave a detailed analysis of the two articles which Hammer was primarily relying upon in his tenure file (Ex. H, Separate View of J.J. White). Professor Ben-Shahar, who voted against tenure, was persuaded from his own review of Hammer's writings and from Elhauge's assessment that Hammer's work did not satisfy Michigan's standards (Ben-Shahar 17-19). There was no evidence that reviewers Elhauge and Blumstein had any awareness of Hammer's sexual preference. It is also undisputed that Hammer had every opportunity to strike Elhauge in 2002 and stated in an e-mail to Rob Howse that "there are no particular individuals that I would list as persons not to seek outside review letters from" (Howse II, 50-52; Ex. H). Moreover, it was Howse, the chair, who decided to solicit a review letter from Elhauge, and Howse voted in favor of tenure (Howse II, 51).

Associate Dean Evan Caminker read Hammer's entire file, including both the internal and external review letters, and carefully analyzed how the letters "dovetailed" with Caminker's understanding of Hammer's work (Caminker 6-7). Caminker found the external reviews of Elhauge and Blumstein to be quite helpful because of their expertise in the subjects in which Hammer taught and had written (Caminker 9, 11). Caminker voted against tenure because he concluded that Hammer's work did not demonstrate sufficient quality to satisfy Michigan's tenure standards (Caminker 6, 48-49).

The two primary articles in Hammer's tenure file were not regarded as making a significant contribution in the field or evidencing sufficient care and craft as to predict that Hammer would become a leading scholar in the fields covered by the articles (Frier 5-6; Caminker 9-10, 48-49; Ex. H). Some faculty found Hammer's written work vague, "opaque," very difficult to read and lacking in any particular insight which constituted a significant

contribution to legal scholarship (Frier 5; Clark 13; Herzog 10). Some faculty were also influenced by the critical internal reviews of Professors Ben-Shahar and Sallyanne Payton, even though Payton favored tenure because of Hammer's teaching and service (Caminker 13; Herzog 10-11, 18; Logue 9; Payton 21). Payton clearly testified that Hammer's scholarship was "below" the Law School's standard (Payton 21). Kauper, who also wrote internal reviews, said that his endorsement was not enthusiastic (Kauper 25-26). Some faculty felt that the report of the tenure committee itself was a "red flag" because it reflected a three-member majority, had a separate concurring opinion and a separate dissenting opinion, and that the majority report stretched to make a positive case for awarding tenure (Frier 4, 6; Herzog 18). Though she concurred, Malamud's separate report contained criticisms of Hammer's work (Ex. H; Miller 40).

**F. Plaintiff Files a Grievance With the University.**

Near the start of the Fall, 2002 term, Hammer filed a grievance, which was heard and denied by a faculty Grievance Review Board. The grievance primarily challenged the standards by which his tenure application was considered. Apart from his grievance, Hammer was invited to submit evidence of his discrimination complaint to the Dean of the Law School, the Provost, or the University's Office of Institutional Equity and Diversity but failed to do so (Caminker 144-145; Courant 71, 76-77; Lehman 40-41, 101). Similarly, Hammer submitted no complaint of discrimination to the University's Executive Director of Human Resources & Affirmative Action, as provided in the Faculty Handbook (Ex. D).

**III. ARGUMENT**

**A. Plaintiff Must Prove That His Sexual Orientation Was An Actual Reason For Tenure Denial.**

Hammer's discrimination claim is not predicated on a statute because there is no federal or state statutory cause of action for discrimination on the basis of sexual orientation. Instead, Hammer relies on a *Toussaint*-type theory of recovery to claim that the University violated its

own policy of nondiscrimination on the basis of sexual orientation when it denied him tenure. To recover, Hammer must prove that a sufficient number of faculty voted to deny him tenure because of his sexual preference. Hammer must prove that his sexual orientation was an *actual reason that caused or motivated the negative vote*.<sup>4</sup> To put it in other words, Hammer must prove that the impermissible reason, i.e. his sexual orientation, was a “substantial factor” in the denial of tenure. *Mt. Healthy City School District v Doyle*, 429 US 274, 287, 97 SCt 568, 50 L Ed 2d 471 (1977). The tenure policy of the Law School required that Hammer receive affirmative votes from two-thirds of the faculty present. Because Hammer received only 18 favorable votes and 14 non-favorable votes of the 32 faculty present, he must identify five<sup>5</sup> or more specific faculty members who counted as non-favorable votes and for each of those faculty members prove by a preponderance of the evidence that the faculty member intentionally voted against Hammer because of his sexual preference.<sup>5</sup> Hammer cannot sustain this burden.

**B. Principles Governing Summary Disposition For Statutory Discrimination Claims Should Apply To Plaintiff's Quasi-contract Claim.**

Plaintiff challenges his denial of tenure by claiming that he was discriminated against on the basis of sexual orientation in violation of University policy (Complaint ¶ 39). Although premised on quasi-contractual grounds, the challenge is analytically identical to suits based on alleged discrimination in violation of the Elliott-Larsen Civil Rights Act or Title VII. Accordingly, the Court of Claims can consider principles for evaluating motions for summary

<sup>4</sup> Even if Hammer's claim is analyzed as a claim under Michigan's Elliott-Larsen Civil Rights Act, the ultimate factual inquiry is whether Hammer's sexual preference was a motivating factor, namely, whether it made a difference in the contested employment decision. *Hazle v Ford Motor Co.*, 464 Mich 456, 466; 628 NW2d 515 (2001). See, also *Hazen Paper Co. v Biggins*, 507 US 604, 610, 123 L Ed 2d 338, 113 SCt 1701 (1993) (when a plaintiff alleges disparate treatment, “liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision,” that is, the plaintiff's age must have “actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.”)

<sup>5</sup> Hammer claims that the Court must declare void the tainted votes in the overall 2/3 calculus. See, Plaintiff's March 8, 2006 Brief in Opposition To Defendant's Motion For Summary Disposition, p. 12, (attached hereto as Ex. L). If 5 of the 14 non-favorable votes are ignored, the vote would have been 18 favorable and 9 unfavorable, which would have satisfied the 2/3 requirement. Hammer has not made such a showing.

judgment brought in Title VII or ELCRA proceedings in deciding this dispositive motion on Hammer's contractual discrimination claim. Indeed, Hammer specifically relied on decisions under the ELCRA in the prior round of briefings before this Court and the Court of Appeals.

C. In Adjudicating Defendant's Dispositive Motion, The Court Must Not Second Guess Defendant's Academic Judgment Of Plaintiff's Scholarship.

This case is a challenge to a tenure decision of the University of Michigan Law School. It is well-settled that courts must be reluctant to review the merits of academic tenure decisions, an admonition particularly appropriate in this case, where the undisputed evidence shows that Hammer was denied tenure based on an evaluation by Law School faculty of his written scholarship and not his sexual orientation. Under established principles of Title VII of the Civil Rights Act of 1964 and the Michigan Elliott-Larsen Civil Rights Act, a court cannot substitute its assessment for that of Defendant University in determining whether Plaintiff satisfied the Law School's standards for achieving tenure.

The Michigan Supreme Court has instructed that when evaluating a plaintiff's purported evidence of pretext, Michigan courts should not second-guess whether the employer's decision was "wise, shrewd, prudent or competent," *Hazle v Ford Motor Co*, 464 Mich 456, 464 n 7; 628 NW2d 515 (2001). The prohibition against second-guessing the soundness or competence of an employer's personnel decision is particularly appropriate in discrimination cases involving university tenure decisions. Those courts that have been called upon to address discrimination claims in the academic setting have acknowledged that courts are not to evaluate the scholarship and qualifications of tenure candidates or substitute their judgment for that of the academic institution.

Federal Courts have repeatedly analyzed claims alleging denial of tenure following this standard.<sup>6</sup> In *Dobbs-Weinstein v Vanderbilt University*, 185 F3d 542, 545 (CA 6, 1999), the Sixth Circuit Court of Appeals acknowledged that "tenure decisions in an academic setting involve a combination of factors which set them apart from employment decisions generally," citing factors such as "the lifetime nature of the contract, the fact that the decisions are often noncompetitive, the decentralized nature of the decision-making process, the multiplicity of factors in the decision, the fact that tenure decisions are often quite contentious, and the reluctance of courts to review the merits of a tenure decision," citing *Zahorik v Cornell Univ*, 729 F2d 85, 92-93 (CA 2, 1984). The Second Circuit Court of Appeals in *Zahorik* explained that courts are understandably reluctant to review the merits of a tenure decision where the tenure file contains the conflicting views and opinions of specialized scholars and the level of achievement required for tenure will vary between universities and between departments within universities. Statements of peer judgments as to the merit of the tenure applicant's scholarship and writing may not be disregarded absent evidence that they are a façade for discrimination. *Zahorik* at 93. See also *Frumkin v Board of Trustees, Kent State University*, 626 F2d 19, 21-22 (CA 6, 1980) ("universities have traditionally been afforded broad discretion in their administration of internal affairs").

<sup>6</sup> Judicial deference is consistent with a litany of federal court decisions exhibiting an extreme reluctance to overturn reasonably exercised academic judgments. See, e.g., *Lieberman v Grant*, 630 F2d 60 (2<sup>nd</sup> Cir 1980)(award of tenure not appropriate because such determinations are subjective and involve inquiry into aspects that are beyond the competence of the courts); *Thornton v Kaplan*, 937 F Supp. 1481 (DC 1996)(courts should not entangle themselves in tenure determinations best left to the academic community); *Jalal v Columbia University*, 4 F Supp2d 224(SDNY 1998)("judges are frequently admonished not to second-guess the merits of a university's collective academic judgment as to a tenure candidate's qualifications"); *Lovelace v Southeastern Massachusetts University*, 793 F2d 419 (1<sup>st</sup> Cir 1986)("universities have a strong need for . . . exercising what is largely a subjective judgment in deciding to whom to grant tenure"); *Beitzell v Jeffrey*, 643 F2d 870 (1<sup>st</sup> Cir 1981)("The initial decision to grant tenure . . . typically calls for the exercise of subjective judgment, confidential deliberation, and personal knowledge of both the candidate and the university community"); *Faro v New York University*, 502 F2d 1229 (2<sup>nd</sup> Cir 1974)("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision").

In *Weinstock v Columbia University*, 224 F3d 33, 43 (CA 2, 2000), the Court held that the university had a "legitimate, nondiscriminatory reason" for denying a female candidate tenure in spite of a positive 3-2 vote by the ad hoc committee where there was disagreement about the originality of plaintiff's work and the strength of external review letters. See also *Mukhtar v California State University, Haywood*, 299 F3d 1053, 1067 (CA 9, 2002) *modified on denial of reh'g* 319 F3d 1073 (CA 9, 2003) (vacating a jury verdict in favor of a Title VII plaintiff denied tenure, the court stated that "academic tenure decisions involve subjective judgments on scholarship that neither courts nor juries are well qualified to make"); *Tanik v Southern Methodist University*, 116 F3d 775 (CA 5, 1997); *Jiminez v Mary Washington College*, 57 F3d 369 (CA 4, 1995).

The Court of Claims should not second-guess the conclusion reached by Law School faculty regarding the merits of Plaintiff's scholarship. Yet a trial of this case will ineluctably require an examination of just how the faculty evaluated Plaintiff's written scholarship and whether such evaluation was legitimate. Courts have made it clear that a plaintiff must present clear and preponderant evidence to show that the rationale for denying a candidate tenure is a pretext for intentional unlawful discrimination.

1. **Plaintiff Has Failed To Establish A Prima Facie Case Of Intentional Discrimination On The Basis Of Sexual Orientation.**

To prevail on a claim of discrimination, Hammer must prove intentional discrimination, i.e. that faculty intentionally voted to deny him tenure because of his sexual preference. Further, "a plaintiff must offer evidence showing something more than an isolated decision to reject a minority applicant." *Hazle, supra* at 471, *citing Teamsters v United States*, 431 US 324, 358, n 44; 97 SCt 1843; 52 L Ed 2d 396 (1977). The discrimination must be intentional. It cannot have occurred by accident. *M Civ II* 105.02. In this case, it is undisputed that Hammer did not

convince two-thirds of the participating faculty that his scholarship satisfied the Law School's minimum standards.

It is well established under the Elliott-Larsen Civil Rights Act that absent evidence that the decision-makers acted on an alleged discriminatory predisposition, summary disposition is required. *Reisman v Board of Regents of Wayne State University*, 188 Mich App 526, 537; 470 NW2d 678 (1991) (to prove intentional discrimination, the plaintiff must show that the person who discharged him was predisposed to discriminate against persons in the affected class and actually acted on that disposition in discharging him). *Meagher v Wayne State University* 222 Mich App 700; 565 NW2d 401 (1997); *Schulte v Naylor*, 195 Mich App 640, 646; 491 NW2d 240 (1992); *Singal v General Motors Corp*, 179 Mich App 497; 447 NW2d 152 (1989).

To establish a *prima facie* case of discrimination under ELCRA Plaintiff must demonstrate that he was a member of a protected class, he suffered an adverse employment action, he was qualified for the position for which he applied, and that the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 462-63; *Clayton v Meijer, Inc*, 281 F3d 605, 607 (CA 6, 2002). A plaintiff may prove intentional discriminatory treatment in violation of the ELCRA by either direct evidence or indirect circumstantial evidence. *Sniecinski v Blue Cross Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. *Id.*

Hammer did not satisfy the Law School's standards for scholarship and was therefore not qualified for tenure at the Law School. It is undisputed that those who voted against tenure in Hammer's case did so because scholarship did not meet the rigorous standards of the Law School. Hammer cannot create an issue of fact simply because he disagrees with that assessment or simply because he deems himself qualified. Moreover, the mere fact that some faculty voted

in favor of tenure does not create an issue of fact for trial, where it is undisputed that the issue of qualifications is decided by a 2/3 majority of those participating in the final meeting.

As demonstrated below, even if Hammer is a member of a protected class under Defendant's policy, suffered an adverse action, and met minimum qualifications for the position, he cannot satisfy the fourth prong of the requirements for a *prima facie* showing of discrimination, i.e. he cannot demonstrate as a matter of law that the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. Hammer has identified no direct or indirect evidence that any faculty member voted to deny him tenure *because of* his sexual preference. More specifically, Hammer has not shown that any faculty were predisposed to discriminate on the basis of Hammer's sexual orientation and that they *acted* on such a predisposition in voting to deny tenure. Plaintiff was denied tenure because of the quality of his scholarship. There is no admissible or probative evidence of any other motivation. See *McCart v J. Walter Thompson, Inc*, 437 Mich 109, 115, n 4; 469 NW2d 284 (1991).

2. **Plaintiff Has No Direct Evidence of Discrimination.**

Hammer has no "direct" evidence of discrimination, that is, evidence which, if believed, *requires* the conclusion that unlawful discrimination was a motivating factor in the employer's decision. *Hazle, supra* at 462; *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Alleged statements that Plaintiff relies on as "direct evidence" are nothing more than stray remarks. The Courts have established a four-part test to determine whether stray remarks can be imputed to a decision maker. The test requires the Court to look to "(1) whether the alleged discriminatory remarks were made by the person who made the adverse employment decision or by an agent of the employer that was uninvolved in the challenged decision, (2) whether the alleged discriminatory remarks were isolated or part of a pattern of biased comments, (3) whether the alleged discriminatory remarks were made in close proximity to the challenged employment decision, and (4) whether the alleged discriminatory remarks were

ambiguous or clearly reflective of discriminatory bias.” *Michigan Dept of Civil Rights v Fashion Bug of Detroit*, 473 Mich 863, 867; 702 NW2d 154 (2005), citing *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289; 624 NW2d 212 (2001).

In his deposition, Hammer identified only one colorable anti-gay remark. Hammer claims that four years before his 2002 tenure review he heard a comment in the faculty lounge of the nature that one had to be homosexual or a Jew to be hired in the Law School and that “there was just too many gay and Israeli people” on the faculty (247, 250). Plaintiff does not know who made the alleged remark, nor did he complain to anyone in the University about it (246, 251).<sup>7</sup> There was no evidence that the unknown declarant voted on Hammer’s tenure application, or that this view was shared or considered by anyone who did vote. Indeed, of the faculty members Hammer remembers seeing in the lounge when he claims he heard the remark, Kamisar, Soper and Kahn did not even participate in the tenure decision. It is a nonprobative stray remark with no causal connection to Hammer’s tenure review. *Krohn supra* at 295 (finding no abuse of discretion in trial court’s exclusion of “out with the old and in with the new” comment in age discrimination case, holding comment ambiguous and age-neutral).<sup>8</sup>

3. **Plaintiff Fails To Establish A Prima Facie Case Of Discrimination Through Indirect Or Circumstantial Evidence.**

Hammer cannot establish a prima facie case of discrimination through indirect or circumstantial evidence. “[A]lthough a hunch or intuition may, in reality, be correct, the law

<sup>7</sup> Hammer claims that this remark was made right after the Law School hired Jim Hathaway, Jane Schacter and Juliet Brodie, all of whom are openly homosexual, in 1998.

<sup>8</sup> After Defendant filed its original motion for summary disposition, Hammer claimed for the first time claim that he heard insensitive comments about the pregnancy of Professor Schacter with partner Juliet Brodie. Hammer claimed that an unidentified faculty member used the reference “turkey baster” when learning that the female gay couple were expecting a child. The Court should strike these statements if Hammer tries to incorporate them in yet a *third* affidavit. The “turkey baster” comment is not inherently anti-gay but more a crude reference to artificial insemination. Even if the comment could somehow be viewed as anti-gay, it is a non-probative stray remark because there is no evidence whatsoever connecting this comment to Hammer’s tenure review.

requires more if a plaintiff is to avoid summary disposition. A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation." *Fonseca v Michigan State University*, 214 Mich App 28, 31; 542 NW2d 273 (1995) (affirming summary disposition on ELCRA sex and marital status discrimination claims of applicant denied admission into university's doctoral program). Under the standards for evaluating motions under MCR 2.116(C), Hammer cannot identify sufficient evidence to establish a *prima facie* case of discrimination and summary disposition should be granted.

In instances where, as here, no direct evidence of discrimination exists, courts apply the burden-shifting analysis developed in *McDonnell-Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) and *Texas Dept of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed 2d 207 (1981), to determine whether a plaintiff can prove a claim of discrimination. *Reeves v Sanderson Plumbing Prod, Inc*, 530 US 133; 120 S Ct 2097; 147 L Ed 2d 105 (2000); *Hazle, supra* at 462-63; *Lytte, supra* at 172-74. The burden-shifting analysis requires Hammer to first establish a *prima facie* case of discrimination. *Hazle, supra* at 463. If, and only if, Plaintiff meets this initial burden does the burden of production (not the burden of proof) shift to Defendants to articulate a legitimate, non-discriminatory reason for their actions. *Id.* Plaintiff then has the ultimate burden of establishing that the articulated reason is merely a pretext for unlawful discrimination. *Id.*

Hammer cannot established a *prima facie* showing of discrimination under the *Hazle* and *McDonnell-Douglas* test because he cannot demonstrate that his denial of tenure occurred under circumstances giving rise to an inference of discrimination. Here, there was no dispute that Hammer was given an extra chance to earn tenure and was afforded a full faculty review and a second vote after Dean Lehman gave Hammer special non-teaching time to improve the corpus of his scholarship. And there is no dispute that the Law School's procedures for evaluating the

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tenure candidate were scrupulously followed in Hammer's case. Rob Howse, who chaired Hammer's tenure committee in 2002 and who voted in favor of tenure, ensured that Hammer's case was given thorough and careful attention. Hammer must therefore adduce admissible and probative evidence that at least five faculty members harbored a predisposition against homosexuals and that they acted on that predisposition. In other words, he must identify by admissible evidence facts showing that his sexual preference was a determining factor in the decision to deny him tenure. *Free v Carnesale*, 110 F3d 1227, 1231 (CA 6, 1997) (holding that when the matter of causation is one of pure speculation or conjecture or the probabilities are at best evenly balanced, the duty of the court is to direct a verdict for the defendant); *Boggan v BellSouth Telecomm Inc*, 86 F Supp 2d 545, 550 (NC 2000) (plaintiff's allegation that others received more favorable treatment was based upon hearsay, speculation or both and was insufficient to withstand summary judgment). Here, it is undisputed that those faculty who favored Hammer for tenure were aware of no evidence to indicate that his homosexuality was in any way a factor in the vote of those who opposed tenure. Though she supported him for tenure because of his service, Professor Payton determined that Hammer's scholarship was "below" the Law School's standard (as did those faculty who voted against tenure).

4. **There Is No Admissible And Probative Evidence That Faculty Were Predisposed To Discriminate On The Basis of Sexual Preference Or That Any Faculty Acted On Such A Predisposition.**

Hammer fails to establish a *prima facie* case of discrimination because he adduced no admissible evidence that any faculty was predisposed to discriminate against Hammer on the basis of his sexual orientations let alone *acted* on that predisposition when he or she voted on Hammer's tenure application. A careful review of the alleged indirect evidence cited by Hammer demonstrates that he failed to show predisposition or that any faculty acted on a predisposition against gays in deciding Hammer's tenure application. Through alleged tangential evidence, unfounded accusations and attacks on other gay faculty, Hammer asks the Court to

draw unreasonable and unsupportable inferences to impugn the motivation of several (not all) faculty who voted against tenure. Hammer has not adduced sufficient evidence to defeat summary disposition.

- **Dean Jeffrey Lehman:** The only evidence of predisposition cited by Hammer was an article in a Cornell University student newspaper, which accused Lehman of being anti-gay for allowing military recruiters on Cornell's campus where Lehman was President *after* leaving Michigan. The article, of course, was inadmissible hearsay and was written several years after Hammer's tenure decision. Under a provision of federal law known as the Solomon amendment, universities could lose federal funds if they banned from their campuses military recruiters with their "Don't ask, don't tell" policy against gays and lesbians. But it is undisputed that Lehman opposed this provision of federal law and instructed Cornell University's general counsel to oppose it in the Supreme Court (Lehman 98-99) even though that Court subsequently upheld the constitutionality of the provision in *Rumsfeld v FAIR*, 547 US 47, 126 S Ct 1297, 164 L Ed 2d 156 (March 6, 2006). Accusations in a Cornell student newspaper regarding military recruiters years after Hammer's tenure vote at Michigan is no evidence that Jeff Lehman harbored an anti-gay bias or acted on that bias in voting against tenure for Plaintiff. As a matter of law, such references cannot create a genuine issue of fact for trial as to discriminatory intent. Moreover, while he was Dean of the University of Michigan Law School, Lehman hired at least four faculty he knew to be gay – two of them with tenure. Lehman was extremely accommodating to Hammer. Lehman afforded him a leave of absence and a reduced teaching load so that Hammer could improve his chances of achieving tenure at the second review. Lehman testified that Hammer's scholarship was not sufficient. Even if the Court credits the Cornell student newspaper, Hammer adduced no evidence that Lehman acted on a predisposition against gays in voting to deny Hammer tenure or that the reason for Lehman's vote was pretextual.

• **Rich Friedman:** Hammer makes no claim, let alone presents any evidence, that Rich Friedman was predisposed against gays or that he acted on such a predisposition. Instead, Hammer asserts that a triable issue of fact exists because of a supposed discrepancy between Friedman's deposition testimony and an email Friedman sent after Hammer's tenure denial to help him find a job. In his deposition, Friedman stated that he believed Hammer's scholarship failed to meet Michigan's standards because, among other things, Hammer was not likely to become a national "leader" with respect to his published scholarship (Friedman 26-27). Specifically, Friedman stated that he felt that "it was not sufficiently likely that [Hammer] would be a sufficiently good scholar to justify an award of tenure." (Friedman 29). After Hammer's tenure review, Friedman sent an email to several professors at Ohio State University in an effort to help Hammer land a job there (Friedman 39-40). The email does not specifically praise Hammer's scholarship; instead it carefully states that "opinions differ and you can exercise your own judgment" (Friedman 44-45). Friedman's email, however, does praise Hammer as being a "leader, and a mover and shaker, in the field of health care" in connection with Hammer receiving invitations to participate in conferences (Ex. M). There is no contradiction between the statements in the email about Hammer's virtues and Friedman's deposition testimony about Hammer's scholarship, as the term "leader" is used in two different senses.

The purpose of Friedman's email to Ohio State was to assist Hammer in finding another teaching position at that university, not to assess Hammer's writings for purposes of achieving tenure at Michigan. See *Stacy v Tisch Investment Advisory, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251525) (plaintiff failed to create a jury triable issue with regard to reliance on a letter of recommendation, the purpose of the letter was to assist plaintiff in finding other employment, not to make a record of her work performance) (attached hereto as Ex. N). Accord *EEOC v MCI International, Inc*, 829 F Supp 1438, 1455 (D NJ 1993); *Aungst v Westinghouse Elec Corp*, 937 F2d 1216, 1223 (CA 7, 1991).

Under these circumstances, there is no inconsistency and the Friedman email is no evidence of pretext, let alone of a biased predisposition or any action thereupon. And, of course, Hammer nowhere provides evidence to explain why Friedman would assist Hammer in finding employment if Friedman were truly biased against gays.<sup>9</sup>

Even if the Court finds the Friedman email to be evidence of pretext, it is no evidence of pretext for intentional discrimination and cannot defeat summary disposition. *Hazel v Ford Motor Co*, 464 Mich 456, 465-466 (2001) (a plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual but that it was a pretext for [unlawful] discrimination." *Citing, Town v Michigan Bell Telephone Co*, 455 Mich 688, 698; 568 NW2d 64 (1997); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175-176; 579 NW2d 906 (1998).)

• **Don Herzog:** As to Don Herzog, Hammer cited no evidence of bias or that Herzog acted on a predisposition against gays. Instead, Hammer cites Herzog's deposition testimony in which Herzog remembered faculty member Tom Kauper discussing Hammer's work, and alleges this testimony must be false because Kauper was actually out of the state at the time of the 2002 tenure meetings. Hammer fails to remind the court, however, that there were two tenure considerations. The testimony Hammer relies upon to claim that Herzog's vote was biased or pretextual conveniently fails to clarify whether Herzog was referring to the 2000 vote or the 2002 vote. *Moreover*, even if Herzog were mistaken as to the timing or even form of Kauper's remarks (since Kauper submitted written memoranda for both decisions), this is no evidence of anti-gay bias or pretext (Kauper 25-26). Indeed, the unrebutted testimony of Jane Schacter, a former gay faculty member, is that she was and is good friends with Herzog (Schacter 8-9, 33).

<sup>9</sup> Previously this Court surmised that a worker might favorably exaggerate a reference for a co-worker he is biased against, in an effort to make it more likely that the disliked co-worker will leave (Motion Hearing Transcript July 27, 2006 pp. 34-35) (attached hereto as Ex. O). Such conjecture simply does not apply to Friedman; once denied tenure, Hammer was going to have to leave Michigan Law School whether he had another academic position lined up or not.

- **Sherman Clark:** As to Sherman Clark, Plaintiff's only evidence of bias is his claim that a law review article authored by Clark shows Clark to be pro-life. The fact that Sherman Clark may view himself as pro-life is no evidence that he harbored bias against gays. It is sheer speculation to equate pro-life views with a predisposition against homosexuality. Professor Clark is also African American. Are Hammer and his attorney telling this Court that because African American Sherman Clark is pro-life, he is predisposed against Plaintiff because of his sexual orientation? Moreover, Plaintiff presented no evidence to suggest that Professor Clark's pro-life views were expressed or ever considered in connection with Hammer's tenure review. There is no record evidence that being pro-life or pro-choice is a proxy for anti-gay bias; nor is there any evidence that Clark acted on such a predisposition in voting to deny Hammer tenure or that the reasons for Clark's vote were a pretext for intentional discrimination.

- **Carl Schneider:** Hammer cites no evidence to indicate that Schneider voted against tenure for any reason other than Hammer's scholarship. Instead, Hammer claims that Schneider has repeatedly written articles opposing gay marriage. A careful review of Exhibit 22 to Plaintiff's Brief in Opposition To Defendant's Motion for Summary Disposition (On Reconsideration), however, shows that Plaintiff has seriously misrepresented the record. In most of the examples cited, Schneider is merely reporting the results of certain studies or surveys regarding views of marriage or the prevalent attitudes surrounding marriage at the time the article was written. For instance, Plaintiff cites the following statement from Schneider's 1992 article "The Channeling Function in Family Law" 20 HOF STRA L. REV. 495 as evidence of Schneider's alleged animus:

But one particularly extensive and careful study of sexual attitudes conducted as late as 1970 concluded: 'We have doubts that such a [sexual] revolution occurred.' The study's data demonstrated one striking fact: with regard to many forms of sexual expression, our respondents were extremely conservative. **A majority disapproved of homosexuality, prostitution, extramarital sex, and most forms of premarital sex.**

Plaintiff's Brief in Opposition To Defendant's Motion for Summary Disposition (On Reconsideration) Ex. 22 at p 4, ¶6 (emphasis added by Plaintiff). In context, this statement merely recites the results of a survey conducted in 1970, and in no way illustrates Schneider's personal position on the subject. None of the articles cited is primarily concerned with "gay marriage," and Plaintiff's attempt to discredit Schneider is disingenuous. Plaintiff's assertion that the articles evidence Schneider's bias against gays is meritless. In addition, Hammer's bald assertion that the contents of any article in which the author thanked Schneider for offering comments or suggestions should be attributed to Schneider is equally absurd. See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment (on Reconsideration) Ex 22, pp 9-12. The irrelevant excerpts are more than ten (10) years before Hammer's tenure review

Hammer also argues that there is an issue of fact as to Schneider's motivation because Schneider testified in deposition that he no longer considers himself an expert in the field of family law and has rarely written on the subject in recent years, yet Schneider is listed as a member of the Council on Family Law in one of their recent reports in 2005 (along with 20 other members). There is no evidence that Schneider authored this report or that the report portrays Schneider to be personally opposed to gay marriage. Whatever Schneider's views on the state of marriage or his assessment of his current expertise in family law, they create no genuine issue of fact for trial as to Schneider's motivation for voting against tenure in Hammer's case.<sup>10</sup> There is absolutely no record evidence that Schneider's views on marriage ever entered the deliberation process on Hammer's tenure application. Nor has Hammer identified any evidence to show that

<sup>10</sup> Hammer claims that Schneider "[h]as written repeatedly on the subject of homosexual marriage rights" (Brief in Opposition to Defendant's Motion for Summary Disposition (On Reconsideration) p. 23). Even if this assertion were true, this is no evidence that (a) Schneider was homophobic or (b) that Schneider voted against tenure because Hammer is gay. See *Hazle, supra* at 465-66 (a plaintiff is required to do more than raise a triable issue that the employer's stated reason was pretextual; he must demonstrate that it was a pretext for unlawful discrimination), citing *Lytle, supra* at 175-76.

the reasons for Schneider's vote are a pretext for intentional discrimination on the basis of sexual preference.

- **Kyle Logue:** Hammer claims that Logue must be homophobic because Logue (a) teaches Sunday school at a local Baptist Church, (b) claimed in deposition not to know his church's views on homosexuality, and (c) testified in deposition that he did not know whether he is "pro-life" or "pro-choice" and did not remember the holding in *Roe v Wade*. Hammer also claims that a 1996 email from Logue is inconsistent with Logue's assessment of Hammer's tenure dossier six years later. The fact that Logue may have taught Sunday school at a local Baptist Church is no evidence that he harbored any anti-gay bias, let alone voted to deny Hammer tenure because of his sexual orientation. Indeed, Logue testified that homosexuality did not violate his personal religious beliefs (Logue 21), and Hammer presented no admissible evidence to the contrary.<sup>11</sup> Contrary to Plaintiff's assertions, Logue, a tax lawyer, did not state that he could not recall the holding of *Roe v Wade*. Logue plainly stated that "I don't have a strong view about the *Roe v Wade* case" (Logue 23).

Moreover, Logue never stated that he did not know whether he was pro-life or pro-choice; he merely requested that Plaintiff's attorney define the terms he was using instead of relying on generic terminology (Logue 21-23). Logue's refusal to give a categorical, black or white answer to an intentionally vague question about what for many is a complicated issue

<sup>11</sup> Hammer goes so far as to rely on a surreptitious tape recording of a conversation between the minister of Logue's Baptist church and Plaintiff's private investigator impersonating a potential parishioner. The hearing transcript of that conversation is inadmissible but more importantly makes no mention of Logue or his personal views on the subject of homosexuality.

cannot serve as the basis for an inference that Logue was lying in his deposition or is somehow anti-gay.<sup>12</sup>

Finally, Hammer separately refers to a 1996 email from Logue to Hammer in which Logue says only that "I like the paper, and I agree with your conclusions" (Ex. P). But that favorable review of one single and early draft article does not bind Logue's judgment about Hammer's later writing that Logue reviewed six years later in evaluating Hammer for tenure.

None of Plaintiff's purported evidence is probative of bias or pretext, particularly where Hammer is using Logue's religious affiliation to attack Logue's academic assessment of Hammer's scholarship.

• **Bill Miller:** As with Logue, Hammer cites the religious affiliation of Miller to allege that he must be homophobic. The record simply does not support such speculation. The fact that Bill Miller is Jewish, belongs to a conservative synagogue and has written books with comments about how society (not Miller himself) views gays, African Americans and Jews, is no evidence that he was predisposed to discriminate against Peter Hammer on the basis of sexual preference. Hammer relies on a single statement Miller made in conversation about his book *Disgust*, in which Miller gives the example of two men kissing in public as something that disgusts him. But Hammer mischaracterizes this statement in suggesting it reflects anti-gay bias. In deposition, Miller testified that sexual orientation has nothing to do with his views on this point; rather, all public displays of kissing (heterosexual or homosexual) offend him (Miller 20). Miller may exhibit self-described "prudishness" (Miller 21), but one cannot reasonably infer from this

<sup>12</sup> When asked to state whether he is "pro-life" or "pro-choice," Logue replied he could not simply classify his views under such generic terms (Logue 21-23). Far from being suspicious, such a response is entirely reasonable given the vast range of positions one might take on abortion. If someone believes abortion should generally be legal but would outlaw late-term "partial birth" abortion procedures, is he "pro-choice" or "pro-life" under the "commonly understood meaning" of those terms? What if he would not prohibit abortions outright but supports parental notification or consent provisions? What if he supports 24-hour waiting periods, or spousal notification requirements? For many, being forced to classify themselves as "pro-life" or "pro-choice" without further definition of the terms is being forced to accept a misleading label. Logue's deposition responses create no genuine issues of material fact for trial.

that he is biased against gays. Moreover, the *Disgust* book was published in 1997, some five years before Hammer's tenure review. Even if one could infer from the two-men kissing remark some unique discomfort with public displays of homosexuality, the remark is so isolated, remote and unconnected to the tenure decision. It is at best a stray remark which cannot defeat summary disposition. See *Dept of Civil Rights, supra* at 157 (one of the factors the court looks at when determining if 'stray remarks' can be imputed to a party is the temporal proximity to the comment and the alleged discrimination.)

5. **Plaintiff's Generalized Beliefs And Assertions Of Discriminatory Bias Cannot Defeat Summary Disposition.**

Plaintiff has not shown that any faculty member who voted against him expressed a bias against homosexuals. Instead, Plaintiff repeatedly attempts to tie an individual's religious beliefs or views on issues such as abortion and gay marriage to alleged anti-gay bias against him. Plaintiff can show no correlation between a person belonging to a certain church or having an opinion on abortion or gay marriage and their views on homosexuality. Even if he could make this connection, which he cannot, Plaintiff has failed to demonstrate that any of the faculty acted on their opinions in unrelated matters in deciding whether to grant or deny Hammer tenure.

Plaintiff's bald assertions are not enough to infer animus on the part of the faculty evaluators. Plaintiff alleges that unnamed faculty members displayed discriminatory animus because they talked about their children or because they lived in the "family setting" Burns Park area of Ann Arbor (101, 244, 364). Generalized accusations that certain faculty held an anti-gay bias, without any specific evidence of such bias, does not create a genuine issue of fact for trial. *Carmen v San Francisco Unified School District*, 237 F 3d 1026, 1028 (CA 9, 2001) (plaintiff's belief that defendant acted from an unlawful motive is no more than speculation or unfounded accusation and does not constitute evidence to withstand summary judgment); *O'Regan v Arbitration Forums, Inc*, 246 F 3d 975, 986-987 (CA 7, 2001) (lower court did not abuse

discretion in striking portions of affidavit of plaintiff's witness who speculated about the decision-maker's thoughts). Hammer cannot avoid summary disposition by way of assertion, accusation and speculation.

Even if the Court were to treat Plaintiff's submissions as evidence of predisposition, Hammer has failed to demonstrate that any faculty member *acted* on that predisposition in voting to deny him tenure. Absent evidence that the decision-makers acted on the alleged predisposition, summary disposition is required. *Reisman, supra* at 537 (To prove intentional discrimination, the plaintiff must show that the person who discharged him was predisposed to discriminate against persons in the affected class *and actually acted on that disposition in discharging him*) (emphasis added); *Meagher, supra* at 709; *Schulte, supra* at 646; *Singal, supra* at 503.

Most importantly, Hammer does not dispute that the faculty who *supported* him for tenure consistently affirmed that his sexual preference was not a factor in the outcome of the faculty vote (Cooper Affidavit ¶ 8; Chambers Affidavit ¶ 5, 6; Howse I, 14, 20; Reimann 14, 19-21; Green 28, 34, 37; Payton 13). The disagreement over the strength of Hammer's case was in good faith. As his supporters consistently affirmed, the focus was on the scholarship. Thus, even if the record supported a finding that certain faculty were predisposed to discriminate, there is no evidence whatsoever that they expressed those views in the faculty vote or that the views were a factor in the tenure decision.

What is undisputed is that the Dean and faculty who reviewed Hammer for tenure hired openly-gay Jane Schacter and Jim Hathaway with tenure. Openly-gay Professor Brodie, Schacter's partner, was hired into a clinical faculty position created as a recruitment incentive for the couple (Schacter 26-27). Schacter and Brodie never even applied or inquired about employment at Michigan; the Law School contacted them and urge them to join the Michigan faculty (Schacter 28-29, 31). Other gay members of the faculty who had been awarded tenure

were Bruce Frier, David Chambers, Jim Martin and, according to Hammer, Whitmore Gray (266). Moreover, Hathaway, Schacter and Brodie have all attested to the receptive and supportive environment they encountered at Michigan (Hathaway 9-10, 23-25; Schacter 27, 33, 51; Brodie 41-43). Professors Hathaway, Schacter and Brodie expressly contradicted Hammer's unsupported allegation that the Law School is anti-gay (Hathaway 20-25; Schacter 33-35, 37-38; Brodie 28-30, 35, 41-43).<sup>13</sup> They all testified that Hammer's speculation that they felt anti-gay bias at Michigan was utterly false (Brodie 28-31; Schacter 37-38; Hathaway 23-25).

Summary disposition is therefore warranted because Hammer cannot demonstrate a *prima facie* showing of intentional discrimination.

**D. Summary Disposition As To Count I Was Also Warranted For the Reason That Plaintiff Adduced No Probative Evidence of Pretext.**

Even if the Court concludes that Plaintiff has established a *prima facie* claim of discrimination, his discrimination claim should be dismissed because he cannot show that Defendant's articulated, legitimate, non-discriminatory reasons for the tenure denial are pretextual. See *Hazle, supra* at 465-66. Defendant adduced a legitimate, nondiscriminatory reason for denying Hammer tenure – his written scholarship. To defeat Defendant's motion, Plaintiff is required to do more than show pretext – he must show that Defendant's actions were a pretext *for intentional discrimination*. *Id.* (a plaintiff is required to do more than raise a triable issue that the employer's stated reason was pretextual; he must demonstrate that it was a pretext for unlawful discrimination), citing *Lyle, supra* at 175-76. A plaintiff's belief about his qualifications is insufficient as a matter of law to establish pretext for discrimination. See *Hazle, supra* at 476-77. Thus, Hammer cannot survive summary disposition unless he presents sufficient admissible evidence to create a reasonable factual dispute that the employer's

<sup>13</sup> Throughout her career, Jane Schacter has written and taught in the area of sexual orientation and the law and has chaired the American Association of Law Schools Section on Sexual Orientation and Gender Identity (Schacter 38-40)

proffered reason for the denial of tenure (i.e. his scholarship) was a mere pretext, and that discrimination was the true motivation. *Lytle, supra* at 175-76.

To demonstrate pretext, a plaintiff must do more than second-guess his employer's decision. See *Reeves, supra* at 143; *Chappell v GTE Products Corp*, 803 F2d 261, 266 (CA 6, 1986) (the soundness of an employer's business judgment may not be questioned as a means of showing pretext); *St Mary's Honor Center v Hicks*, 509 US 502, 515; 113 SCt 2742; 125 L Ed 2d 407(1993) (simply disproving an employer's proffered "nondiscriminatory" reason is not sufficient to survive summary judgment; the disproof must also raise a triable question of discriminatory motive, not mere falsity); *Warfield v Lebanon Corr Inst*, 181 F3d 723, 730 (CA 6, 1999) ("A plaintiff must do more than simply impugn the legitimacy of the asserted justification for her termination; in addition, the 'plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation.'"). "[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition *only if* such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. . . ." *Lytle, supra* at 175-176. See also *Hazle, supra* at 465-66 ("a plaintiff 'must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination'"). The burden on Plaintiff to demonstrate a genuine issue of fact for trial is even greater than usual when challenging academic tenure decisions. See Section IV(B), *infra*.

Moreover, where a discrimination plaintiff creates only a weak issue of fact as to whether the employer's proffered reason is pretextual, the employer is entitled to summary disposition. As the U.S. Supreme Court state in *Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133, 148; 120 SCt 2097; 147 L Ed 2d 105 (2000):

. . . Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was

discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. . . . 530 US at 148.

Hammer has no probative or substantive evidence of pretext. Hammer failed to persuade a sufficient number of faculty that his scholarship should earn him tenure. There is no evidence that individual faculty members evaluated his work any differently than the work of other tenure candidates. There is no factual support for a claim that any faculty voted for any reason other than their assessment of the merits of Hammer's scholarship.

The tenure committee's report, Professor J.J. White's dissent, and the external reviews clearly evidence questions about the quality and significance of Hammer's work. His scholarship was "below" the Law School's standard. There is no record evidence to dispute that the criticisms of Hammer's scholarship were genuine and the true reason for the negative votes.

**E. Plaintiff Cannot Establish a Detrimental Reliance Claim.**

In Count II of this Complaint, Hammer alleges that in reliance on Defendant's commitment of nondiscrimination on the basis of sexual orientation, he "forbore from obtaining other favorable employment at major institutions across the country" and lost the opportunity to obtain tenure at one of these institutions. Hammer's deposition testimony flatly contradicts this speculation. Hammer testified that while his choices in 1995 were Columbia, Georgetown, U.C.L.A. and Michigan, he did not want to live in New York City and decided to accept Michigan's offer *before* determining whether his partner would be offered employment at the remaining two schools (19-21). Even if Hammer gave up other opportunities, this does not support a promissory estoppel claim in Michigan as a matter of law. *Barber v SMH (US), Inc.*, 202 Mich App 366, 375-376; 509 NW2d 791 (1994) (conclusory allegation that plaintiff gave up

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