

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
AMENDED MOTION FOR SUMMARY DISPOSITION

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PREFACE

Defendant has moved for summary disposition on Counts I and II of Plaintiff's Complaint. It had previously moved to dismiss these counts twice, both unsuccessfully and then sought leave to appeal to the Court of Appeals based upon this Court's denial. In seeking leave to appeal it emphasized in the Application for Leave to Appeal its primary issue before this Court in earlier motions, namely that the University policy on non-discrimination could not form the basis of a legitimate expectation on Hammer's part and be enforced under the principles of *Toussaint*. While on appeal, per the direction of the President of the University, the Defendant withdrew that argument. Thereafter, Plaintiff successfully moved to dismiss the appeal and the matter was remanded to this Court. Plaintiff does not see posed in any of the briefs filed by Defendant in this round of motions an argument to the effect that the policies against discrimination based upon sexual orientation cannot be enforced in this action. As a result, much the same as Plaintiff expressed in the Court of Appeals, Plaintiff here expresses the belief that Count II is thereby mooted. If the Defendant concedes that the policy in question is subject to contractual enforcement, Count II becomes superfluous. Count II is a claim based upon principles of estoppel and seeks to estop Defendant from denying the legitimacy of Plaintiff's expectations. Plaintiff would suggest that the best course of action would be to dismiss Count II by stipulation with the caveat that if Defendant asserts its earlier defense, namely, that Plaintiff could not reasonably rely on the University policies of non-discrimination, that Plaintiff would be allowed to once again pursue the theory set out in Count II.

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’Melveney & 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. (Despite Defendant's claims to the contrary, Hammer was "closeted" during his recruitment and hiring and came out only after an offer of employment had been made.) (Hammer affidavit)

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.¹ 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)²

1 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.

2 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.

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-sabbatical leave in the Fall of 1998 and for his Sabbatical leave in the Fall of 2001. (Exhibit 28)³

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

³ 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.

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 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 accurate 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)

It was not Hammer alone who was stunned by the decision of the tenured faculty. Joseph Vining wrote to Hammer the following day (attached as Exhibit 33) in which the finding reflected "last night was a tragedy for this school. Your work here has been ambitious, risk-taking, broad, and above all good – effectively good in the largest way. Your life while here has been the same." He was not alone. Rob Howse, the chair of tenure committee, wrote an email to Hammer,

"I want obviously to talk to you when there is a good moment, but I want to convey to you my profound sadness and sympathy in the current circumstances. Speaking for myself, through this process, I am to know your writing and other academic accomplishments well and to admire them greatly, as well as your reputation in the broader law and policy community. I feel comfortable supporting through a recommendation or reference your appointment as a tenured

faculty member at any other law school or institution in this country or worldwide to which you might want to apply, and I can assure you that my bottom line in this letter will be UNQUALIFIEDLY positive.”

Exhibit 34,

In an exchange of emails between Catherine McKinnon and Jim Hathaway the vote against tenure was characterized as “not a good day for human rights” (Hathaway @ 14) and in reflection “the hazards of not being there”. (Id.) And why should these people have not felt that way in reaction to the denial of tenure when Jeff Lehman, the Dean of the law school had selected Hammer’s two-year project under the Robert Wood Johnson Foundation grant as one of the few examples given in the research and scholarship publication touting the University of Michigan’s “law schools stature as a center of legal study”. (See publication attached as Exh. 26)

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 or anything related thereto, 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 (the rejection of Hammer's grievance as being non-grievable) 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 economics 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 encouraged in the past 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 (Exh 27) 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.

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.⁴ (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.

⁴ 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, a fact verified by e-mail to him from David Chambers. (Exh 35) Hammer participated in a monthly poker game with certain of his colleagues and 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. (Hammer affidavit)

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 “gooey 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. (See Chamber’s Affidavit). 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 tribute 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. (See denial in Affidavit of David Chambers but contrary admissions made to colleagues as evidenced by the Affidavit of Robert Precht). While Chambers claims that he was not being groomed for the Dean’s position and that he has no feelings concerning why he did not get the Dean’s position the Affidavit of Robert Precht demonstrates that Chambers even as an emeritus professor still demonstrates the palpable way that fear imposes itself

on his will to freely express his feelings in and around his heterosexual colleagues.

Chambers, in his Affidavit, submitted to the University for filing with the Court, denies being groomed and denies feelings of discrimination in that selection process. In a more closeted environment around his gay contemporaries, however, he freely expressed those feelings both to Plaintiff and to Rob Precht. As an aside, Plaintiff's counsel would be remiss in not bringing to the Court's attention the fact that it was Plaintiff's counsel who contacted Mr. Chambers to set up a telephone conference for the purpose of discussing various points dealing with Hammer's situation. It was Plaintiff's counsel that suggested that Chambers might be more comfortable if Mr. Seryak also participated in that telephone conversation and thereupon invited Mr. Seryak to participate. During that conversation Mr. Seryak attempted to interfere with the free-flow of information from Mr. Chambers. Following that conversation Mr. Chambers expressed a willingness to provide an affidavit regarding the substance of that conversation which included, among other things, Chambers' statement that Hammer's sexual orientation was discussed during the February, 2002 tenure meetings, albeit in a positive way. For reasons unknown, Chambers decided to provide the affidavit on a much more limited basis (and in some ways conflicting with what he had discussed with counsel) to Mr. Seryak for filing with the Court. When Plaintiff's counsel confronted him on the issue and emailed him asking him if he would be willing to file an affidavit and detailing the points to be made, Chamber simply refused to do so, however never denied the accuracy of the conversation as reflected in that email.

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. (White @ 3-5; 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. (Chambers' Affidavit; 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, Ex. 31)⁵ On February 25,

⁵ Because of the sheer volume of exhibits the chronology of events is contained in a single exhibit numbered 31. The pages that follow which are referenced to emails and communications between Hammer, Camniker and Lehman, as well as Kellaman and others are not included in Exhibit 31. The documents have previously been filed with the Court.

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)

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 - - -!" (Friedman Dep. Exh 8 – not attached)

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 14th 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 20th 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.

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; see also Exh. 36) 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 demonstrated homophobic traits. Furthermore, at least three additional individuals who voted against tenure have demonstrated serious credibility flaws with respect to their assertion that they voted against tenure for Peter Hammer because of his scholarship such that summary disposition would be inappropriate. Response to Defendant's motion is made far more difficult than need be.

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 Francis Miller attached) Omri 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 three 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 three votes are void, then the resulting vote count is 18 in favor and 9 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 briefly outlined here so that the court has a sense of the duplicity with which Plaintiff's discovery efforts 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 the 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)
- Admit 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)
- Hammers’ 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 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 lukewarm 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. (Dep 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, 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 Whitman⁶ to Peter K. Westin dated April 24, 2002 and attached hereto – Exh 32)

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.

⁶ Professor Whitman was an associate dean at the law school immediately prior to the 2002 tenure vote in question.

David Chamber, as indicated above, obviously had some “chilling” interaction with the Defendant between the time of his conversation with Plaintiff’s counsel and the time Plaintiff’s counsel requested an affidavit from him. What, by whom or how that came about will never be known. What is known is that Chambers’ affidavit is false respecting his own efforts to become dean of the law school. (Precht Affidavit; Hammer Affidavit; Chambers’ Affidavit)

In February of 2002, shortly after Hammer’s tenure vote, Chambers e-mailed Hammer. (Exh 35) In his e-mail he acknowledged that the two woman failed to achieve tenure “. . . had quite problematic personal relations with many of the faculty that were complicated by but not entirely ascribable to gender.” With respect to Hammer, he acknowledged the “Burns Park” phenomenon described in Hammer’s Affidavit. He also acknowledged that Hammer’s relationship with male faculty was not as tight as theirs was with each other. Finally, Chambers acknowledged that Hammer, a gay man, had a softer edge in his writing. It was more “integrative and pragmatic rather than confrontational” and would not surprise Chambers if those characteristics “would cause problems. . . when hard-headed academic types look at [Hammer’s] writing.”

As for Schacter and Brodie, much was previously said about their reasons for leaving tenured positions at UM to return to Wisconsin – the “public” reasons were that they were homesick. Hammer’s testimony was that they felt they did not fit in at UM. Their depositions have now been taken and verify Hammer’s assertions.

Both have moved to Stanford and did so a few years after leaving UM. When they left UM to res5turn to Wisconsin in 2000 Brodie did not return to her former position (Brodie @ 22) While at UM, their closest friends from Madison visited one or

two times. (Id @ 24) During that time frame Brodie does not recall going to Madison to visit their friends. (Id 24-25) As for her experience at UM she opined “If everything had been great for us we wouldn’t have left.” (Id @ 34) Brodie acknowledged voicing complaints about aspects of the workplace during poker. (Id @ 34) The people she socialized with (Croley and wife; Hills; Herzog) all voted against Hammer. (Id @ 39) No one has ever called to ask her about Hammer’s allegations concerning their UM experience. (Id @ 46)

Schacter testified that she left UM because she missed the Wisconsin idea – “The University in service of the state – to reach out and make society better.” She missed that atmosphere as well as the informality at Wisconsin. (Schacter @ 45-46) She described UM as being more formal. (Id @ 46) She asserted that while some of the people at UM reached out to improve society, at Wisconsin it was a core part of their identity. (Id @ 46) She was friendly with Bill Miller, who voted against Hammer. (Id @ 49) One of the reasons she returned to Madison was there was a very large lesbian population – “lots of children who have two moms”. (Id @ 11) When asked to identify two mom families in Ann Arbor that she had befriended she indicated there were two with whom they socialized. As for the first, she could only remember the first name of one and could not remember her partner’s name, and as to the second, they had no children while Schacter lived in Ann Arbor. (Id at 11)

The above demonstrates Hammer’s credibility on the various claims he asserted respecting Chamber’s desire to become Dean and Schacter and Brodie’s reasons for leaving UM.

ARGUMENT

I. Plaintiff has demonstrated a *prima facie* case of breach of contract.

Defendant initially briefed its summary disposition motion all but ignoring the analysis it now foists on the court. Mention of Plaintiff having to prove his case by standards developed under a statutory scheme that denies him protection was in passing in Defendant's initial brief and consisted of approximately 3 pages in its rehearing brief. It has now grown to be the primary thrust of its argument. It does so for a very obvious reason. Plaintiff's *prima facie* case for breach of contract is relatively easy to prove. Defendant would rather have Hammer climb a much higher mountain. While Hammer will demonstrate that he can climb any *prima facie* case mountain defendant might pose, the court should be mindful that this is a case of breach of contract, not an ELCRA case.

Under applicable standards for summary disposition in an employment case for breach of an employment contract, Hammer need only show that he entered into the contract (now conceded), that he performed his obligations under the contract and was nonetheless terminated. *Johnson v. Jessop*, 332 Mich 501, 503; 51 NW2d 915 (1952). The burden is the defendant's to demonstrate it had a legal excuse for the discharge. The question here is has UM made such a demonstration, i.e. has it demonstrated that Hammer's scholarship was the reason for discharge, and not his sexual orientation? Hammer submits that it has failed on both accounts.

Defendant's newfound argument attempts to shift the burden of proof on Hammer to show that UM had no reason to deny him tenure and discharge him. Even this heightened burden has been met. That is not to say that the court should accept

defendant's notion that Hammer's claim must be analyzed under a statute that denies protection to him and does not recognize him as a protected group member. Of more than casual interest is the fact that while defendant attempts to have the court apply the ELCRA standard by analogy, in briefing the *de facto* tenure issue it argues that the court should not apply analogous decisions under a similar statutory scheme arguing that one set of protections is statutory while the other is contractual. If that is in fact the case then defendant should not be allowed to prevail on each of these inconsistent arguments. If this court were to rule in favor of defendant on the *de facto* tenure issue in part because one was a statutory scheme and one a contractual scheme, then it would appear that an inconsistent argument here would violate principles of judicial estoppel. *Pastiche v. Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994)

Hammer, in accordance with the foregoing authority, maintains that it is defendant's burden to demonstrate it had cause to terminate his employment. Hammer's burden of proof does not require evidence of pretext. To the extent Hammer is required to show some evidence that sexual orientation entered into the consideration, he has done so. Logue's concealment of his church's teachings, not to mention his own buffoonery during deposition, is such evidence. Before discussing that specific evidence an observation of defendant's practice of making statements that are palpably false is in order. Defendant seems to assert – in its discussion concerning Logue's testimony about *Roe v. Wade* -- that his ignorance should be excused because he is a tax attorney. It ignores the fact that he testified that he also taught Products Liability and insurance law. (Logue at 2) It also ignores the fact that Logue's professional activities have included a publication in the Boston University Law Review discussing the issues concerning

reparations for the heirs of those who were slaves in the United States. (Exh. 37) On March 10, 2004 he was scheduled to deliver a lunch address in the UM Fawley Lunch Series titled “*Why Slavery Suits Don’t Make Sense, But Redistribution By Race Just May.*” (Exh. 38) In June 2003 he submitted an abstract for a symposium titled “*Legal Transitions, Rational Expectations and Legal Progress.*” (Exh. 39) In May, 2003 he co-authored an abstract titled “*Insuring Against Terrorism – and Crime*”. (Exh. 40) Logue is far from a tax nerd who does not think about social issues. And yet, when questioned about social issues, Logue either dissembled or “played the fool”. But most importantly, Logue has shared one keen insight into his *persona* that is more than of casual interest. Logue acknowledged that he had been instructed not to share with Hammer what had transpired during the tenure vote meeting. He nonetheless felt it was OK to tell Hammer that sexual orientation was not a factor. When asked whether he would have shared the information with Hammer had sexual orientation to his mind played a part in someone’s criticism of Hammer’s work, he said “I don’t know if I would or not.” (Logue at 17-18)

Logue, when asked “. . . do your beliefs condemn homosexuality – religious beliefs?” answered “You have to be more specific. What do you mean?” (Logue at 19) When counsel followed up at Logue’s feigned confusion and asked, “ I didn’t necessarily want to get into your religious affiliation necessarily as much as I want to find out whether or not the institution, if any, with which you’re affiliated for religious practices condemns homosexuality as an abomination?”, Logue responded “Okay. I’m sorry. You lost me on the last part. You said not to deal with the specifics and then you said - - “ (Logue at 19) An objection was interposed following which Logue asked if the question could be asked again. Counsel then asked “Sure. Without getting into your particular religious

affiliation - -“ and was interrupted by Logue: “What does that mean? I don’t understand what that means.” (Logue at 20) Logue’s extreme evasiveness continued on the topic of his religious affiliations and beliefs as did his dissembling. When asked whether homosexuality was contrary to the teachings of the Bible Logue stated: “I don’t know. I haven’t made a study of it. I don’t know.” (Logue at 21) Logue teaches Sunday school at a fundamentalist Baptist Church that openly condemns homosexuality and does not admit homosexuals to membership. (See attached web site from Huron Hills Baptist Church and Investigator transcript)

Logue’s evasiveness surfaced only on hot button social topics. When asked if he was Pro Choice or Pro Life, he stated: “ You’ll need to be more specific.” (Logue at 21) After ducking the question with inane questions of his own, Logue finally stated “I mean actually I don’t have settled views on this, and for me to work out my views here, we would need to specify pretty specifically what you mean by pro choice or pro life.” (Logue at 22) In utter frustration of Logue’s unwillingness to respond to the simplest questions, counsel then asked if he agreed with *Roe v. Wade*. Despite the fact that it is a prominent issue and has been in the forefront of public discussions over the appointment of the most recent Supreme Court appointees, Logue had the temerity to say: “Wow. I haven’t thought about that in a long time. I don’t know. I’m not an expert on constitutional law or *Roe v. Wade*. I remember thinking a lot about this and talk – arguing about it in law school, but I don’t have a strong view about the *Roe v. Wade* case.” (Logue at 23) It is fair to conclude first, that Logue was lying when he said he had not thought about this in a long time. His statement that he was not an expert on the

topic was unresponsive to the question, as was his habit. Given his church affiliation and the level of his participation it is obvious that he was simply lying.

All of this is the long way of saying that defendant's assertion that there is no evidence to suggest that Logue's given reason for voting against Hammer was false is absurd. Logue's only writing discussing Hammer's scholarship was positive. (Exh. 20) Logue testified that he was neutral about Hammer's scholarship even after reading Elhauge's negative external letter and Ben-Shahar's negative internal letter, as well as J.J. White's dissent. (Logue at 7) He claims what he relied upon was the oral presentation of Friedman, Payton and Malamud. The latter two voted in favor of tenure. Friedman had written opinions of Hammer at odds with his oral presentation.

As for the others, **Miller** has opined that Hammer, because of his sexual orientation, is a person of low status and a member of a pariah group. He believes that Hammer kissing his partner is disgusting. **Schneider** believes Hammer should not enjoy the same rights as others because of his sexual orientation. He dissembles when asked about this, which is even more telling. **Herzog** and **Frier** evaluated the worth of Hammer's scholarship despite the fact that neither of them are lawyers. They voted against Hammer because of his writing style, apparently. **Clark** lied under oath about his beliefs respecting a woman's right to an abortion. He stated he was "Pro Choice" in his deposition and published an article in the Ave Maria Law School Law Review in which he passionately advocated the "Right to Life" position. He used Hammer as a pawn in orating about the rights of homosexuals and did so in a way that made Hammer want to crawl away. **Friedman** secretly persuaded others to vote against Hammer while wishing Hammer luck in the process. He threatened Hammer not to sue and when he felt

Hammer might not, he wrote a glowing e-mail to his OSU contemporaries lauding Hammer's abilities. When his writings were to be disclosed, he used a vulgar expletive to describe his feelings by email to the Associate Dean.

Finally, the Dean, Lehman, has dissembled on so many different topics it is difficult to list them all without trying the patience of the court. He lied about being publicly accused of homophobia. When confronted with the identity of the publication he then falsely stated that the focus of the accusation was not he but others at Cornell. He placed a false legend on a critical letter about Hammer to keep Hammer from obtaining copies. He testified falsely on when and how the extension of Hammer's teaching appointments came about. He testified that he would discriminate on the basis of race if it was not unlawful. While defendant tries to insulate Lehman from taint by asserting that he was the person who hired Hathaway, Brodie and Schacter, there is no admissible evidence to support the claim. To the contrary, the evidence from those who participated was to the effect that the faculty committee's were responsible for the recruitment and the hiring decisions. Hammer himself was instrumental in making sure that Brodie and Schacter were considered and was likewise instrumental in steering Hathaway through some treacherous actions on the part of a few of the faculty members who were not so enlightened. Lehman may have extended the offers of employment, but he did so upon the faculty making the decision to do so.

All of this is the long way of saying that UM breached its obligation to Hammer in terminating him. He has demonstrated through admissible evidence that UM, through some of its less enlightened faculty, opposed his tenure in part for reasons the defendant was contract bound not to consider.

II Direct evidence of discriminatory animus compels denial of the defendant's Motion

Defendant repeatedly ignores the obvious import of Hammer's evidence insofar as it demonstrates bigotry on the part of several of the "no" voters. While it has devoted more time to analyzing the evidentiary record as it relates to Logue, Miller and others, it ignores the import of their testimony.

Beginning with Logue, his testimony was far from benign. He lied under oath about the nature of his participation in the activities of his fundamentalist Baptist Church. He alternatively lied about and was evasive about his own belief set insofar as "hot button" issues of abortion and gay rights were concerned. But most telling was that he belongs to and is active in an organization that bars gays from belonging. He belongs to an organization that condemns homosexuality as a sin against God and an abomination. That he would belong to such an organization is evidence that he acts on his closeted predisposition to distance himself from gays. It is evidence that he acts on his predisposition. Not only does he belong to such an organization, but both he and his wife are Sunday School teachers passing on this aberrant belief set to the innocent children who attend. If Hammer's claim was one of race discrimination and Logue was a proud member and officer of the KKK one might well draw an inference that his membership was evidence of racial bias and motivation to discriminate.

Miller, too, cannot slide by as easily as defendant would like. He characterized gays as people of low status and admits to observing in a law school setting that the most innocuous of acts by gays is something he considers disgusting, i.e. two men kissing. He was less than truthful about his religious tenets, indicating that he attends a conservative

Shul and that the conservative Jewish beliefs are not anti-gay, yet evidence is before the court that only now is that religious movement considering whether to abandon the Biblical condemnation of homosexuality as an abomination. He has expressed his beliefs of the status and disgusting traits of gay people at the law school and in his writings over a long period of time. To his credit, unlike Logue, when Miller was asked if the Bible condemned homosexuality he assured that it did and told where that was to be found.

The appropriate analysis of the factors that make this evidence compelling is to be found in *Linker v. City of Flint*, 2003 Mich App LEXIS 2986 (2003), an unpublished opinion (attached). While this opinion has no precedential effect, it is a compelling analysis of existing and published case law involving various principles that apply with equal force to the facts of the case at bar. Rather than citing each principle and the case law controlling the same, Hammer refers the court to this case as a compilation of those cases and principles for quick reference.

Both Logue and Miller claim they voted against Hammer based upon their perceptions of his scholarship. Each maintains they did not consider Hammer's sexual orientation in voting against him. Each was describing their state of mind at the time they voted in the tenure meeting. Each was describing their intent. And yet summary disposition in such cases is hardly ever appropriate. *Linker, supra*, at page 3, citing *Harrison v. Olde Financial Corp.*, 225 Mich App 601,606 n 5, 572 NW2d 679 (1997) and *Michigan National Bank-Oakland v. Wheeling*, 165 Mich App 738, 744-745, 419 NW2d 746 (1988).

In Miller's case, the remarks made by him were not stray remarks. They were not remote. They constitute direct evidence under appropriate standards. In order that such

remarks be considered “direct evidence” the court should use four factors in its analysis: “(1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?” *Linker, supra*, at page 5 citing *Krohn v. Sedgwick James, Inc*, 244 Mich App 289, 292, 624 NW2d 212 (2001) Miller’s remarks satisfy each of the 4 prongs of the test. Indeed, in Miller’s case, there is permanence to his expressions. Since direct evidence of discriminatory animus is presented, the court need not analyze Miller’s proffered reason and whether it was pretext for discrimination. In direct evidence cases, no such analysis is required. (See discussion in *Linker, supra*, at page 3)

In Logue’s case, the evidence is even more damning. Logue, in an important part of his life, belongs to an organization that would not allow Hammer to belong **because he is gay**. Logue tried to conceal the extent of his participation in this religious organization. Logue tried to conceal the nature of the religious organization by feigning ignorance about social “hot button” issues such as abortion. Using an analysis similar to that set out for “remarks” that might constitute direct evidence of discriminatory animus, one readily comes to the same conclusion as in Miller’s case. First, the actions complained of were by a decisionmaker. Second, the actions are part of a pattern of actions, (Membership in such an organization; weekly Sunday School teaching; other publications urging the introduction of religious beliefs into the law school experience). Third, the actions have been ongoing and were as of Logue’s deposition. And fourth, the

actions of the organization are clearly reflective of discriminatory bias. Logue's activities in this regard are not limited to his church. He also belongs to and is a presenter for "Following Christ 2002 Vision"; an event held in December, 2002 the same year Hammer was denied tenure. The conference is supported by InterVarsity, which carries the attached articles on its web site, all condemning homosexuality and encouraging activism in opposition to the same. (See Exh 41)

Next is Carl Schneider. Schneider, when candid, was helpful to Hammer. He acknowledged that one of the people who had been stricken as an outside reviewer was someone whose opinion he valued. (Schneider @ 15-17) Where he got into trouble was on the issue of sexual orientation. He claimed he was not expert in family law and had not taught in the area for over 10 years. (Dep at 29) He claimed he had not worked through his thoughts on the topic of same-sex marriage. (Dep at 24-25) His own writings give way to the lie. He was still a member of the Council on Family Law as recently as 2005. (Exh. 21) He is listed on a publication that recommends against the legalization of same-sex marriages. (Id. at 24) Moreover, he has written repeatedly over the years on that very topic. (Exh. 22)

While Schneider's views on same-sex marriage may have been insignificant, the fact that he went so far as to lie under oath about it gives rise to an inference that he felt it very important to conceal his true beliefs and activities with respect to whether gay and lesbian members of our community should enjoy the same rights as others to enter into such social compacts. Applying the *Linker* test, Schneider (1) was a decisionmaker, (2) the writings were repeated over a period of time, (3) the remarks were made close in time

– both before and after the tenure meeting, and (4) the remarks were clearly ones that sought to diminish the rights of gay and lesbian people.

There are those who based their negative votes on the writing of J.J. White. To the extent his writings are the product of anti-gay animus and influenced the vote of any of the naysayers, those votes are likewise actionable and tainted. J.J. White, hereafter White (not to be confused with J.B. White) wrote the sole dissent from the Tenure Committee. His dissent has been debunked by Hammer’s expert who maintains it is ill thought out, unprofessional and wrong. Professor Francis Miller states that White acknowledged he has little knowledge of formal economics and antitrust law. Professor Miller was at a loss to understand how White could be critical of Hammer’s use of the term “Hospital Nonprice Competition”, a term of common usage. (Affidavit at 7) In her affidavit, Professor Francis Miller is highly critical of the manner White went about his analysis of Hammer’s work and the standard by which he judged that work. She concludes by criticizing the fact that he dismissed the external reviews of several individuals of high repute and of the pre-eminent scholar in Hammer’s field. Her description of Ben-Shahar’s review was similar in tone and even more caustic in terms of substance. The latter will be discussed below.

And so White, who wrote the sole dissent on Hammer’s tenure committee, is a “person of interest”, as they say. Why? Because his actions fit a pattern. He was Jim Martin’s friend and mentor. Martin came out and then succumbed to AIDS. White’s Tribute about him was lukewarm, at best. It was of nothing terribly personal. The coolness is transparent. White was also present at one of the lesbian-bashing sessions in the faculty lounge and apparently enjoyed the comments. (Hammer Affidavit) White was

chosen to head the committee to “study” various programs. The appointment was made by Caminker. It came after Hammer had been denied tenure and after Hammer had complained of discrimination. White’s “study” resulted in the termination of only one person – Robert Precht – an associate dean who was widely respected and whose program was very successful. (Hammer Affidavit) Precht was openly gay. White was central to the termination of employment of two openly gay men, both widely respected. No evidence has been adduced to demonstrate White was ever involved in the termination of any other individual’s employment at the law school. These were the only openly gay individuals at the law school who were vulnerable – i.e. could be terminated without having to show cause.⁷ The other openly gay members of the faculty came out after they were awarded tenure, something Defendant now concedes. White’s dissent had some affect on the outcome in that Herzog – a naysayer – was moved by White’s dissent. (Herzog at 10, 14, 18)

The rest of the negative votes fall into various other categories. There are those like James Krier who said he simply wanted to vote with the majority. The people who identified as being people he would chat with were White, Frier (a naysayer), Ben-Shahar (a naysayer and an unprofessional reviewer) Bill Miller (who is disgusted my men kissing), Croley (a naysayer) and Ellen Katz. (Krier @ 13) When asked how he would have voted if the vote had been 25 in favor of tenure and 5 against tenure, he indicated he would probably have voted for tenure. (Krier @ 11) There is the negative vote of Don Herzog – the person that alerted Jane Schacter to Hammer’s Complaint – which he ascribes to the lukewarm presentation of Tom Kauper, the resident expert in Hammer’s

⁷ This changed for Hammer afterwards in that Hammer did not receive the requisite notice of non-reappointment. But at the time of White’s actions, Hammer could have been terminated without cause and without hearing.

field. Kauper was not present during the tenure meetings in question and contrary to Herzog's assertion that he was lukewarm, had written a rebuttal to the two negative reviews of Elhauge and Ben-Sharhar (one external and one internal, respectively). There is the fact that both Herzog and Frier, another "no" voter are not lawyers and Hammer's area of expertise is not theirs. They apparently voted against him based upon his writing style.

Then, there are the negative votes of individuals who have been less than forthright about their beliefs. Since their credibility and state of mind are at issue, summary disposition is not appropriate. *Linker, supra* at 3; *Harrison, supra*, at 606 n 5, *Michigan National Bank-Oakland, supra*, at 744-745. Those individuals are Richard Friedman and Sherman Clark.

Richard Friedman is a relatively easy type to discern, looking back at what he did and did not do. Friedman, a tenured professor, was one of the individuals who not only voted against Plaintiff in the tenure meeting, but as well took it upon himself to persuade others to do likewise. His interactions with Plaintiff demonstrate the dissembling that is characteristic of his treatment of Plaintiff's tenure efforts.

Friedman testified that no one discussed Plaintiff's sexual orientation during the tenure meeting resulting in the adverse tenure vote (18 in favor and 12 opposed). (Friedman @ 59) Chambers has said otherwise, albeit that Chambers description of the discussion of Plaintiff's sexual orientation was positive in nature. Why then would Friedman (and every other person who voted against tenure) deny that the subject was raised? Only one explanation makes sense – that while the comments concerning the topic were positive, certain individuals felt revulsion (such as Kyle Logue, whose

religion teaches that homosexuality is an abomination and a sin against God). This court is to draw all reasonable inferences in Plaintiff's favor and not in defendant's favor as defendant repeatedly attempts to have the court do. The inference drawn above is certainly a reasonable one. It is not unlike what would occur if one complimented a member of a group who had marched with Dr. King in Selma only to find out that a few members were also members of the KKK. While the remarks are positive on their face, what they may secretly trigger in others is quite another matter.

The description of Friedman portrayed by his conduct doesn't end here. It only begins. Friedman wished Plaintiff luck just before the tenure meeting culminating in the vote. (Friedman @ 33) When he did so he did not reveal that he was the leader of the opposition. He had written a negative review of Plaintiff's work. He had spoken out against Plaintiff's being granted tenure. But it all remained hidden. After the vote he sent his heartfelt condolences, again keeping his private agenda just that – private. After the vote Friedman tried to scare Plaintiff off from complaining about the vote and when he thought it safe, wrote a glowing letter to his friends at Ohio State University stating precisely the opposite of what he had told his UM colleagues during the tenure discussions.

Ultimately, Friedman – who had never revealed to Plaintiff his negative opinions – was confronted with a request to turn over his tenure review report to Plaintiff. Friedman's response was limited to one word – a gutter expletive one would not expect to find in an email from a professor to the person about to be the new dean of the law school. Friedman would be found out and he did not like it. And so we may never know for certain what his true motivation was, but what we do know is that he was deceitful in

his dealings with Hammer and did not want Hammer to know he was leading the charge against him. Friedman claims that Hammer's sexual orientation was not discussed during the tenure meeting, but we now know it was. (Chambers Affidavit)

Not unlike Friedman, Sherman Clark is a man who keeps his "hot button" beliefs closeted. Clark was the person Hammer identified as going through a ritualistic spiel about homosexuality. The spiel sounded practiced to Hammer. Hammer was visited with the spiel on several occasions, on some as a prop for the spiel to be given to others. The settings along with the spiel made Hammer very uncomfortable. Clark, like Friedman and Logue, was less than forthright in his deposition.

Some of these discussions pertain more to the pretextual nature of the naysayers' claims of innocence. While Hammer does not concede that the shifting burden of proof analysis is appropriate, a brief discussion of that topic will also demonstrate that summary disposition is not appropriate in this case. Before doing so, one final point needs to be clarified. Defendant persists in distorting the record in an untoward way. It has again claimed that there were 18 votes in favor of tenure and 14 against. It reasons that Hammer must therefore disqualify 5 votes in order to prevail. This is a blatant falsehood.

The only contemporaneous record made of the tenure vote was made by Rozona Kelleman. (Exh. 8; Lehman at page 66-67) It was her job to record the total vote. Her vote tally was 18 votes in favor of tenure and 12 against. Defendant asserts now that there were 2 abstentions. There is simply no record of them. What is worse, Hammer requested in discovery that the defendant identify all of the votes cast against tenure. Defendant responded that they needed to canvass faculty because they had no record of

the specific votes. While the credibility of this assertion is seriously in question, counsel patiently awaited the information. Following a canvas of faculty, the defendant identified 14 individuals as either voting against or abstaining at the February 2002 meeting. Not a single individual identified by defendant has testified that he (and they were all men) abstained. And so the contemporaneous record shows no abstentions and the depositions of everyone identified by defendant shows no abstentions. Yet defendant persists in making the claim as if it were a given.

III. The shifting burden of proof analysis of Hammer's claim compels denial of defendant's motion.

Defendant's argument that this court should apply the shifting burden of proof analysis to a claim of breach of contract without citation to a single case that applies such burden of proof to contract claims is feckless. While Hammer does not agree that such a burden of proof should be applied, and in fact is put off by the effort to use a burden of proof for a statute that denies protection to him, a brief discussion of that burden readily leads to the conclusion that defendant's motion is lacking in substance.

The *prima facie* case that Hammer must demonstrate is that he was qualified for the position, was considered for the position, was a member of a "protected class"⁸, and was nonetheless passed over for the position. Defendant apparently concedes that Hammer was a member of a protected class for purposes of its analysis. That he was considered for tenure is a given. That he was passed over for the position, too, is a given. As for the remaining element, Hammer has put forth sufficient evidence from which a finder of fact could find he was qualified. Four out of five Tenure Committee members found that he

⁸ In this instance the protection is afforded by contract.

was qualified. Eight out of nine experts and external reviewers of Hammer's scholarship found he was qualified. 18 out of 30 of his colleagues voted in favor of tenure. These facts alone provide sufficient basis for the court to find a *prima facie* case.

What is left is for the court to determine whether the reason proffered by the naysayers is pretextual. While defendant once again urges the court not to interfere in the internal decisions of the defendant, it has entered into a contract with Hammer. That contract requires the defendant to abstain from certain behavior. It cites to the court no cases whatsoever that hold that the court should allow a university to determine for itself if it breached its contractual obligations where no such reservation is to be found in the contract. In this case, the defendant would not even permit Hammer to pursue a grievance respecting the denial of tenure or any issue even remotely related to the same. (Exh. 31; Hammer Affidavit; Frumkin, *infra*)

Of more than passing interest is the fact that the law school, shortly before Hammer first went up for tenure, adopted a rule that prohibited the filing of a grievance having anything to do with tenure decisions or issues related to tenure. Friedman was instrumental in the law school's rejection of the university-wide policy to the contrary. (Friedman @ 57) He was on the committee with one other person and was the principal drafter of the grievance policy of the law school that denied access to the same to Peter Hammer. (Id @ 57) Paul Courant, the provost, testified that the law school's grievance policy was not in accordance with the university-wide model. He testified that in the absence of one's ability to grieve a claim of tenure denial at the law school because of one's sexual orientation the Provost's office would conduct an investigation into such allegations – "that would be taken very seriously. The claim would be investigated."

(Courant @ 58-61) While Courant claimed he “would ask for a serious investigation” (@61) he did utterly nothing to investigate Hammer’s claims of discrimination. (Id @ 71-73)

The previous discussion concerning the various negative voters serves as Hammer’s proof of pretext. This brief is long enough without once again reiterating what has lead this court to twice deny summary disposition of these claims.

CONCLUSION

Defendant’s instant motion is one that should never have been brought. It attempts to persuade the Court that its interpretation of the evidence is more compelling than the reasonable inferences drawn by the Plaintiff from documentary evidence and testimony of the parties. While the motion is brought under MCR 2.116(10) it should be readily apparent to the Court that not only are there genuine issues of fact to be litigated before one applies any theory of law, but in addition there are compelling credibility issues on the issue of the state of mind of the Defendant’s actors all of which preclude the instant controversy as being appropriate for summary treatment.

It is no wonder to Plaintiff that Defendant does not wish this matter to proceed to trial. It does not want this Court to personally observe the demeanor of Kyle Logue as he tries to explain away his religious beliefs as being a force in his vote. Defendant would not wish to have this Court observe the demeanor of William Miller as he explains why two men kissing is a disgusting thought, but had trouble with the issue of two women kissing. The Defendant would not wish to have the Court observe the demeanor Carl

Schneider as he tries to explain his statement that he has not thought much about same sex marriage and is not an expert in family law while being taken through the various publications that he authored and committees that he is a member of that have devoted considerable energy to that very topic. Defendant does not want this Court to view Don Herzog as he attempt to explain his reliance on Tom Kauper's phantom speech in voting against Hammer when Kauper first was not present and second was very much in favor of tenure for Hammer as is evidenced by his own writings. In short, Defendant does not want the Court to view the witnesses who have maintained a secretive state regarding their deliberative process and their votes for years before finally being compelled to disgorge information concerning that process.

The Defendant's employees met in secret conducting secret talks and a secret vote. To the extent there were negative written reviews of Hammer's work they distorted those views in a way that rendered the limited disclosure to Hammer useless to him. The administration of the law school admittedly placed a gag on all members in attendance at these tenure meetings and thereafter in a very deliberate and organized manner prevented Hammer from obtaining any documents that were in any way meaningful to the process of his tenure.

The secrecy was so complete and overwhelming that shortly before Hammer's first attempt at tenure in 2000 Rich Friedman objected to the University's model for grievance and he and Chris Whitman co-authored the law schools grievance policy adopted in 1999 that prevented the filing of a grievance having anything whatsoever, no matter how tangential, to do with the issue of tenure. As a result, when Hammer sought a meaningful review of the denial of tenure in 2002 he was prevented from grieving the

decision, the process, the failure to disclose documents and most importantly whether his sexual orientation played a role in that process.

In terms of meaningful reviews, the great mystery in this tragic series of events is the fact that the provost within weeks after receiving Hammer's comprehensive letter respecting the provost's review of the tenure decision quipped to Chris Whitman that even had the tenured faculty voted in favor of Hammer, he would not have passed favorably on the issue. The only person from the law school he was in touch with concerning the issue was Jeff Lehman.

Lehman testified falsely as was demonstrated above and placed false legends on documents just for the sole purpose of preventing Hammer from obtaining copies of them under the Freedom of Information Act. Whatever Lehman may have told Courant that led Courant to this opinion will remain a mystery. What is not a mystery, however, is the fact that Lehman and Courant's office both agreed to assist Hammer in obtaining employment elsewhere within the University after the denial of tenure, but when Hammer found three viable options ignored their earlier commitment to do so.

In this tragic era when reading the paper one is frequently confronted with stories respecting hate crimes against homosexuals or perceived homosexuals, one is struck by how little progress has been made in this important area of civil rights. Gays and lesbians are not protected under federal and state law and apparently are not protected from the secretive activities of an empowered and privileged few who are allowed to blackball a talented professor at a prominent law school.

For all of these reasons, this motion should be denied.

Respectfully submitted,

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