

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER,

Plaintiff,

Case No. 04-241 MK

Hon. James R. Giddings

v.

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

Defendant.

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**PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY DISPOSITION**

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I. INTRODUCTION

At the outset, Plaintiff's counsel would offer an apology to the court for the inadequate briefing he did on this issue when it was last before the court. When briefed before the Court of Appeals a different result was accomplished. That this court had arrived at a different result is more a result of the poor initial job done by the undersigned in briefing the issue.

Peter Hammer was a tenure track faculty member of the University of Michigan Law School from May of 1995 through May of 2003. In February, 2000 he was first considered for tenure by the then existing tenured faculty. The process resulted in a decision to defer tenure consideration for two years. In February, 2002 Hammer was again considered for tenure by meeting and vote of the tenured faculty. While he received 18 favorable votes to 12 against **(Exh. 1)**, his bid failed because the practice at the law school required a super-majority vote of two-thirds of the attending faculty.¹

¹ No written notice of non-reappointment was sent to Hammer by the Defendant following the 2002 tenure vote.

Hammer attempted to pursue a grievance and sought a Provostial review. **(Exh. 2)** He also pursued other positions within the University with the blessings and encouragement of the Provost's office and the law school administration. **(Exh. 3: 9/23/02 entry; 9/26/02 entry; 10/1/02 entry; 10/27/02 entry; 11/27/02 entry)**² In January, 2003 he demanded a hearing concerning his termination pursuant Board of Regents By-Law 5.09. **(Exh 4)** When all of these efforts failed, he brought suit in the Court of Claims on three contract theories.

Hammer's suit claimed that he had a reasonable expectation that his sexual orientation would not be a factor in his tenure decision, and that the University had breached that obligation by suffering the participation of several tenured faculty members who were in part motivated by anti gay animus (Count I). It further claimed that if the pre-employment assurances did not rise to the level of an enforceable contractual right, that the University should nonetheless be estopped to deny the validity of such right since it knew he had other opportunities that provided such protection and knew the importance of such protection to Hammer (Count II).³ The third claim of Hammer was that he served 8 uninterrupted years of service at the University and had not received the required notice of terminal year's employment, thus acquiring *de facto* tenure under Regents' By-Law 5.09 (Count III). This motion for partial summary disposition concerns only this final claim.

Hammer asserts that because the required written notice was never given to him, he is entitled to *de facto* tenure at the law school. Defendant will no doubt urge the court to take note of the fact that Hammer asserted in the Court of Appeals that issue of fact existed. To the extent

² The entries correspond to and summarize emails contained in the exhibit.

³ The issues in Count II are now moot inasmuch as the University has withdrawn its opposition to Hammer's claim of reasonable expectation, albeit that it still maintains

Hammer urged that argument on the Court of Appeals it dealt with issues not at stake in this motion.

II. STATEMENT OF FACTS

Peter Hammer was hired by the University as a tenure track assistant professor at the law school in May, 1995. (Hammer 25-26) He remained employed there through May, 2003.

Throughout his employment, the University maintained a by-law which governed the manner in which faculty were to be terminated. (By-Law 5.09, attached as Exhibit 5). According to the by-law, it was applicable “(b) before recommendation is made to the Board of Regents of dismissal, demotion, *or terminal appointment of teaching staff member holding appointments with the University for a total of eight years in rank of full-time instructor or higher. . . .*” (Emphasis added) (Id @ at page 4) The process for termination as set forth in By-Law 5.09 is specific and requires a hearing and that cause be shown. Hammer demanded such a hearing on January 14, 2003 (Exhibit 4) but none was forthcoming.⁴

The Office of the Provost has issued guidelines for the application and interpretation of By-Law 5.09 and related portions of the University’s Standard Practice Guide. (Exhibit 6). At some time following the vote in February, 2002, Evan Caminker, then an assistant dean at the law school (now the dean of the law school), sought advice from the Provost’s office respecting

⁴ Exhibit 6 is Standard Practice Guide 201.88 and governed the process for giving notice of non-reappointment.

the possibility that Hammer might acquire *de facto* tenure. Jeffrey Frumkin, one of the associate provosts, advised Caminker that there is no breach of the University policy required a notice of nonreappointment under the circumstances in Hammer's case and that it be given by September 15, 2002. (Frumkin at 21-22) Subsequently, in the Fall of 2002, Frumkin and Caminker spoke again on the topic. Caminker initiated the contact and indicated that he had failed to meet the time line with respect to the notice requirement. Frumkin concluded that Caminker had not sent notice by September 15th [2002], the beginning of the academic year for 2002-2003. (Id. at 25) This was not in keeping with Frumkin's understanding from their earlier conversation in the Spring of 2002 that Caminker was going to issue a letter by September 15th [2002]. (Id. at 30) Per Frumkin, the purpose for the notice requirement is to provide adequate notice to a faculty member that their appointment at the *University* is going to terminate on a specific date. (Id. at 42) (Emphasis added). This latter point is of interest because even after the adverse tenure vote Hammer was encouraged by the law school dean and the provost's office to find other placement at UM. (Exhibit 3 @ pp. 5 - 6)

While this issue was being tossed about by the law school administration without any apparent action being taken, Hammer was busy seeking a review of the tenure denial through the Provost's office (Exhibits 2 and 3), and as well had attempted to file a grievance regarding various aspects of the tenure process as well as the denial of access to information by the law school administration. (Exhibit 3)⁵ In addition, Hammer had busied himself with finding other appointments within the University, Hammer holding not only a *juris doctorate* degree, but a

⁵ Exhibit 3 is a summary of information contained in numerous writings, followed by the actual writings themselves. The page references are to the summary itself, although the documents from which the information is garnered are a part of the exhibit as well. The

Ph.D. in Economics as well. He did so with the encouragement of the Provost's office and the dean of the law school. (Exhibit 3@ pp. 5 - 6)

At the close of the 2002-2003 academic year, the Board of Regents for the University of Michigan was not advised that Hammer was being terminated. Rather they were misinformed that he had resigned. (Exhibit 10) No evidence exists in this record to suggest that the Board of Regents ever approved the termination of Hammer's employment.

The following uncontested facts form the basis for this motion.

- 1) By his final date of work at the University of Michigan, Hammer had acquired 8 plus years of service on his tenure clock.
- 2) No notice of non-reappointment was provided following the February 2002 tenure vote.

III. ARGUMENT

I.

A. This Court's findings regarding the need for a notice of non-reappointment.

This Court found at the close of all arguments in March, 2006 as follows:

"Well, I believe that there has been at least a fact question that's been raised by the sequence of events. And the Court's going to deny the motion in regard to all three Counts."

March 16, 2006 Transcript at page 35.

On rehearing, this Court found as follows:

summary was created for the convenience of the fact finder.

“I am going to reconsider my decision with regard to Count III. Technically, there may have been a violation, I mean he was well aware of what was going on, he certainly was on notice and the Court would grant the motion to dismiss as to Count III.”

July 27, 2006 Transcript at page 55.

While the wording seems a bit cryptic, it only makes sense if read that the court had found evidence to support Hammer’s position that he was entitled a notice of non-reappointment following the denial of tenure in February, 2002 and did not receive it. The court was discussing notice. The notice of non-reappointment is the only notice at issue. It is as though the court was ruling that while actual written notice of non-reappointment was technically required, the failure to give it was excusable since Hammer “. . . was well aware of what was going on”

The record is unrebutted that Hammer continued to pursue remedies at UM for the denial of tenure until March, 2003 when the Provost issued what is the final word on that issue. By that time Hammer had already requested a hearing pursuant to By-Law 5.09, which was ignored. That he was aware the defendant was not going to honor its obligations does not vitiate the duty of the defendant to send the requisite notice in timely fashion.

B. The legal effect of the failure to provide timely, unconditional written notice of non-reappointment.

The Board of Regents of University of Michigan is a constitutionally created body politic. Michigan Constitution 1963, article VIII, c 5. Like any other employer within the State of Michigan it is free to negotiate the terms of employment enjoyed by its various employees. It is likewise free to otherwise regulate the conditions of employment at its various campuses by use

of policies and procedures. It has chosen to do so in a number of ways. Those that bring focus to the issues in this appeal are its By-Laws, specifically By-Law 5.09, and the sections of the Standard Practice Guide that implement aspects of By-Law 5.09, namely SPG 201.88. (Exhibit 6). The significance of the by-law on the issues of this case is that it designates when a faculty member's employment is transformed from "at will" in nature, to one that can only be terminated "for cause". If the employee is one who can only be terminated "for cause", it sets forth a specific procedure and standard for termination. When an employer sets forth a policy and practice assuring termination only "for cause", that policy is enforceable and a cause in action exists for its breach. *Rood v General Dynamics Corp.*, 444 Mich 107, 138-139, 507 NW2d 591 (1993).

The crux of this claim by Hammer is that when the University failed to provide written, unconditional notice of non-reappointment at the time the University imposed on itself for giving such notice, Hammer's employment became terminable only "for cause." The defendant has never taken the position in this case that Hammer was in fact terminated "for cause" and likewise has not taken the position that the procedures required to be followed for such terminations pursuant to By-Law 5.09 were in fact followed. Instead, the disagreement has focused on whether or not Hammer received the required Notice of Non-Reappointment in the appropriate manner and form so as to prevent him from acquiring "for cause" status.

C. This Court implicitly found that Notice of Non-Reappointment following the denial of tenure in February, 2002 was required.

This Court implicitly found that notice of non-reappointment was required following

Hammer's 2002 denial of tenure and that such notice was not given. Ample testimony was offered to this Court from which such a finding would be justified. By-Law 5.09 and Standard Practice Guide 201.88 were before the court as well as the Guidelines issued by the Provost's office, all of which describe a process whereby in order to avoid *de facto* tenure, the appointing authority must give notice that the faculty member's ensuing teaching year is going to be the terminal year of employment. The notice must be specific and cannot be conditional. (Exhibit 6).

In the spring of 2002 (two years after the letter UM now asserts satisfied the notice requirement) Associate Dean Caminker, being apprehensive that Hammer might acquire *de facto* tenure, sought counsel from Associate Provost Jeffrey Frumkin respecting this issue in and was told that such notice needed to be sent before September 15th [2002]. (Frumkin, pp. 21-22). In a follow up conversation that Fall after the deadline had passed, Caminker acknowledged (without apparent explanation) that he had failed to send such notice despite their earlier conversation and Frumkin's earlier admonition. (Frumkin, p. 25 and 30).

As an aside, it is difficult to imagine that the February 2000 letter defendant now relies upon could be "the" notice since the tenure vote had not taken place and the tenure vote was not the final word on the issue. Per the provost, Paul Courant, he automatically reviewed all recommendations for or against tenure irrespective of the vote of the tenured faculty. (Courant @ 36) Until Courant reviewed the tenure vote, there could hardly be a notice of non-reappointment.

D. This Court incorrectly concluded that Hammer otherwise was on notice.

Hammer, for purposes of this motion only, concedes that an issue of fact exists as to his

state of knowledge on this issue. While he does not concede that the issue of fact is genuine in that it is premised upon the testimony of Lehman and is at odds with Lehman's writings and the testimony of others, it might well preclude summary disposition if Hammer's state of mind were an issue. But it is not. Hammer asserts he is nonetheless entitled to a judgment as a matter of law.

Hammer did not accept that the tenure process was untainted and vigorously pursued efforts to grieve both the process and the result through the Grievance Review Board, the Dean of the Law School and the Provost. This process did not end until March, 2003. (Exhibit 3, entry 3/5/03) Furthermore, Hammer pursued a Provost Review of the tenure decision separate and apart from the grievance process and did not learn that the review results were adverse until late September 2002. (Exhibit 3; see entries for late September through early October) This information came to Hammer after the time for notice of non-reappointment had passed. Further, Hammer received notice in the summer of 2002, shortly before his teaching duties for the 2002-2003 academic year were to begin that he had received a merit increase in pay. (Exhibit 3 at page 3 and corresponding documents).

Hammer holds not only a *Juris Doctorate* degree, but as well holds a Ph.D. in Economics. According to one of the people who voted against tenure for Hammer, Hammer is a mover and a shaker in health care whose service to the University is exemplary and extraordinary. Hammer's teaching, per this individual, is universally regarded as terrific.

(Exhibit 7) Hammer was interested in finding another position within the University. To that end, he began a series of discussions on that topic with Jeff Lehman, then dean of the law school. Those discussions began in February, 2002 following the denial of tenure and continued through

late November, 2002. (Exhibit 3) Not only was Lehman supportive and willing to help, but Valerie Castle, one of the Associate Provosts, lent her support to the endeavor as well. (Id.) The process came to an end in late 2002 after the Provost's office failed to fulfill its commitment to facilitate such a move within the University.

In light of these activities, it is difficult to understand this Court's prior finding that the failure to give the required notice was irrelevant since Hammer otherwise was on notice that 2002-2003 was his terminal year. Nothing could be farther from the truth. Put succinctly, the University failed to give him notice even though Jeffrey Frankin of the Provost's office advised the law school in the spring of 2002 that such notice was now required. Instead of giving him notice, the law school administration encouraged him to look for other employment within the University and expressed a willingness to assist. In the summer following the denial of tenure he received a merit increase in pay. When he questioned the law school representative about whether this was tied to his request to the Provost to review the tenure decision, he was told it was not. He continued to challenge the tenure decision and tenure process until all avenues were exhausted. This process ended in March, 2003 only 2 months before he was let go. In January, 2003 he demanded a hearing pursuant to By-Law 5.09 and none was forthcoming. That Hammer was mindful the defendant would not meet its obligations and commitments to him does not excuse the breach of those duties by defendant.

Since he knew termination was a possibility he looked for tenured positions at other law schools. He knew, of course, that he had an obligation to mitigate his damages. He was also aware that he could not risk the loss of medical insurance for his partner, something that was of the utmost importance to him and his partner. Apparently, the University believes he had to

simply sit back and see what the University would do when May, 2003 rolled around. Had he done so, it would have cried foul and claimed that he had failed to mitigate his damages.

When Hammer went through the tenure process in 2000 and the decision was deferred, he was advised that “if” he failed to achieve tenure in 2002, that appointment (2001-2002) would be his terminal year (Exhibit 8). This notice was insufficient because it was conditional, contrary to Standard Practice Guide 201.88 and it was wrong in that the notice should have provided that 2002-2003 was his terminal year to be compliant with SPG 201.88.

The University claims that since Hammer requested in 2000 that his terminal year be 2002-2003 he somehow became estopped from relying on the notice requirements. For estoppel to apply, the University would have to demonstrate that it relied on Hammer’s representations and that it had a right to do so. *Lakeside v H&J Beef Company*, 249 Mich App 517, 644 NW2d 765 (2002). Since no one testified that there was any reliance on this exchange in 2000 in failing to give the requisite notice in 2002, one of the elements was totally lacking. Furthermore, since Caminker sought and received the advice of Jeffrey Frumkin of the Provost’s office on this very obligation in the spring and fall of 2002, there was no right to rely on Hammer’s earlier request. *Lakeside, supra*. (Reliance must be justifiable).

E. The effect of the failure to give the contractually required notice.

Notice requirements such as the one contained in the Standard Practice Guide are common to our jurisprudence. They are contained in public acts that regulate teacher tenure, for example, an area of law directly analogous to the issues here posed. They are contained in lease

agreements respecting rights of renewal as well as other forms of contracts such as contracts of insurance.

The Michigan Teacher's Tenure Act, MCL 38.83 provides a direct parallel to By-Law 5.09 and its related Standard Practice Guide provisions on the failure to provide notice as set forth in the statute. The Standard Practice Guide of the University requires that in order to effectively terminate the employment of teaching faculty, a written unconditional notice of non-reappointment must be given to the faculty member before the start of the academic year which is to be the terminal year of employment. SPG 201.88 (Exhibit 6). For Hammer, that would have been sometime between February 2002 and September, 2002.

The applicable section of the Teacher Tenure Act provides:

"At least 60 days before the close of each school year the controlling board *shall provide* the probationary teacher with a definite *written statement* as to whether or not his work has been satisfactory. Failure to *submit a written statement* shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year *unless notified in writing* at least 60 days before the close of the school year that his services will be discontinued." (Emphasis added)

MCL 38.83

In *Weckerly v. Mona Shores Board of Education*, 388 Mich 731, 202 NW2d 777 (1972) the Michigan Supreme Court rejected the argument that oral notice satisfied the obligation under the statute. There, a probationary teacher was orally advised in a timely fashion that her contract would not be renewed for the following year. She was told that written notice would follow.

The defendant in fact mailed the notice in timely fashion but for reasons that do not appear clear of record, the notice was returned undelivered at first and was subsequently delivered to the plaintiff, but not within the time set forth in the Act. In holding against the school board the

court unanimously held that oral notice was not sufficient to satisfy the statutory requirement that written notice be given. It further held that the written notice was insufficient in that it was not received prior to 60 days before the end of the school year.

The framework the MCL 38.83 is similar to By-Law 5.09 and the Standard Practice Guide provisions respecting notice of non-reappointment. If the plaintiff in *Weckerly* who had actual notice (oral) in timely fashion but received written notice late (through no fault of the school board) was entitled to continuing employment, most certainly Hammer, who did not receive such notice and in fact received assurances of help in finding another position within the University, should be entitled to continuing employment. The holding in *Weckerly* is in accord with prior precedent. *Munroe v. Elk Rapids Schools*, 385 Mich 618, 189 NW2d 224 (1971); *Wilson v. Board of Education*, 361 Mich 691, 106 NW2d 136 (1960).

The application of these principles to contracts freely entered between parties has likewise been recognized. In *Slaughter v. Cadillac Insurance Company*, 167 Mich App 400, 421 NW2d 702 (1988) the plaintiff had claimed that the failure to provide the contractually imposed 20 days notice of non-renewal at the natural expiration of an automobile insurance policy in question prevented the termination of the insurance policy in question and provided coverage even though the policy by its own terms had lapsed. The statutes of the State of Michigan did not require that a notice of non-renewal be sent under these circumstances. While the statutory scheme for automobile insurance did provide for a 20 day notice prior to the cancellation of an existing policy, the Court observed that no such requirement was imposed when dealing with the “termination of coverage at the end of any policy.” *Slaughter, supra*, at 404.

The policy of insurance itself, however, contained the following provision:

“Non-Renewal. If the company elects not to renew this policy, it shall mail to the insured named in item 1 of the declarations at the address shown in this policy, by first-class mail, a written notice of non-renewal not less than 20 days prior to the expiration date.”

The Court found that this notice provision created a contractual obligation even though it was voluntarily inserted in the contract of insurance by the defendant, and that the failure to provide the notice resulted in the continuation of insurance despite the fact that the policy had by its own terms expired.

In *Slaughter*, given that the plaintiff was no doubt aware that the policy of insurance was expiring of its own terms, the knowledge of plaintiff there could be said to be parallel or superior to the knowledge Hammer enjoyed, namely, whether his appointment with the University was going to expire at the end of the 2002-2003 academic year. Each, however (*Slaughter* there and Hammer here) is entitled to rely on the self-imposed contractual notice obligations of the defendant. There, *Slaughter* was entitled to a 20 day notice prior to the expiration of his policy. Here, Hammer was entitled to written notice of non-reappointment following the denial of tenure in 2002.

Unlike *Slaughter*, Hammer in this instance had reason to believe that his employment was not going to terminate. First, he received notice that he was going to receive a raise in pay some six months after he was denied tenure and shortly before the commencement of the academic year for 2000-2003. When he inquired as to whether the raise was related to the Provost's review of the tenure issues he was told it was not. One does not reasonably expect that one will receive a raise as they are being terminated. Added to this was the fact that both the Dean of the Law School and the Provost's Office had expressed a willingness to assist Hammer in securing other

employment within the University following the denial of tenure in February of 2002 and had encouraged him to look for positions. These assurances occurred over a period of some nine months from February of 2002 until November of 2002.

While the University points to Hammer's search for tenured positions at other law schools, the fact that Hammer may have attempted to mitigate his potential damages by seeking tenured employment at other law schools is simply prudent behavior on his part in an effort to mitigate his damages as well as assure himself that his medical insurance benefit for his domestic partner would go unbroken.

F. Defendant's claim that Hammer's 8 years of University service was broken is without merit

The Defendant previously asserted that Hammer had not acquired eight year's worth of service because of certain leaves of absence (grant related and sabbatical related) that had been granted to him. Plaintiff assumes that like argument will be made here. In light of the guidelines issued by the Provost's Office (Exhibit 9) in which the Provost has ordained that the tenure clock continues to run uninterrupted unless the appointing authority seeks to have that clock interrupted and stopped during periods of sabbatical, leaves of absence or the like, and in light of the fact that no evidence whatsoever was offered to show that the law school requested such an interruption or the Provost ever granted such a stoppage, this is a non-issue. Absent the appointing authority receiving authorization to stop the clock by the Provost's Office, the clock continues to run. There is no evidence whatsoever that at any time Jeff Lehman or anyone on his behalf requested a stoppage of Peter Hammer's tenure clock as a result of his sabbatical leave or

as a result of his grant research work. To be sure, his entire eight years was spent without such a request insofar as the record is concerned.

CONCLUSION AND RELIEF PRAYED FOR

At stake on this motion is whether or not the University of Michigan's By-Laws that convert the employment of its faculty from "at-will" to "for cause" should be enforceable where the University has failed to de-rail the progression of a faculty member's employment through the only means it has provided to itself, namely, timely notice of non-reappointment. On the record there is uncontroverted evidence that shows Hammer was denied tenure by vote of the tenured faculty in February of 2002 and thereafter through November of 2002 pursued other employment opportunities within the University with the encouragement and offered cooperation of the Dean of the Law School and one of the Associate Provosts from the University. In addition, Hammer pursued his grievance options as well as Provostial review of the tenure decision itself through March of 2003. Throughout this period of time, despite the fact that the Provost's office had advised the Associate Dean at the Law School that a Notice of Non-Appointment was required and had to be given by September 15, 2002, the Defendant inexplicably failed to give that notice. It is fortuitous that Hammer understood the possible end of his University employment and sought and obtained other employment at Wayne State University Law School so that Hammer did not wind up unemployed and uninsured in May of 2003.

It is obvious that the Defendant's representatives at the Law School were attempting to

conceal from the Board of Regents of the University of Michigan their own defalcation on this notice issue. Hammer acquired eight years of employment as of May of 2003. In order for him to be terminated at that point in time (assuming that no timely Notice of Non-Reappointment was given pursuant to SPG 201.88) the Board of Regents of the University of Michigan would have to be apprised of the desire of the law school to terminate him and the causes for the same. Additionally, the process set forth in Regent's By-Law 5.09 would then have to be followed. In order to avoid such reporting and such processes the representatives of the law school instead misinformed the Board of Regents for the University of Michigan that Peter Hammer had resigned his employment. (Exh. 10)

The only plausible explanation for their having misinformed the Board of Regents was the fact that they wished to avoid the potential of Hammer acquiring *de facto* tenure. Had Notice of Non-Reappointment been given, it would have been reflected in the minutes of the Board of Regents instead of the trumped up false reasons given by the Law School. It should be clear to the court that Hammer acquired eight years of unbroken service. The Board of Regents of the University of Michigan has not voted to terminate Hammer. Hammer in fact has *de facto* tenure and should still be employed at the University of Michigan Law School. He is entitled to a declaration of rights to that effect.

As a result of the foregoing, Plaintiff respectfully requests that summary disposition as to liability be granted and the matter set down for trial on the issue of damages.

Respectfully submitted,

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Dated: August 9, 2007

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