

1 STATE OF MICHIGAN  
2 IN THE COURT OF CLAIMS

3 -----  
4 PETER J. HAMMER,  
5 Plaintiff,

6 vs.

CASE NO. 04-241 MK

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

HON. JAMES R. GIDDINGS

9 Defendant.  
10 -----

11 DEPOSITION OF:

12 DON HERZOG

13 November 29, 2005  
14 900 Victors Way  
Ann Arbor, Michigan

15 Appearances - PHILIP GREEN, P-14316  
Attorney for Plaintiff

16 RICHARD J. SERYAK, P-26152  
17 Attorney for Defendant

18 Also Present - Evan Caminker

19 Recorded By - NETWORK REPORTING CORPORATION  
20 Melynda C. Jardine, CER-7536

21 I N D E X

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23 Examination by Mr. Green . . . . . 2  
24 Examination by Mr. Seryak . . . . . 25  
25

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DEPOSITION OF:  
DON HERZOG



1 Q All right. And in this particular case -- according to the  
 2 minutes at least -- Professor White spoke, Professor Green  
 3 spoke, and a Professor Relmann spoke after being offered  
 4 the opportunity; do you recall that?  
 5 A No.  
 6 MR. SERYAK: Let me just object to the question to the  
 7 extent you're referring to the minutes. And I'm --  
 8 MR. GREEN: What's the objection?  
 9 MR. SERYAK: -- I'm looking at what you're looking at  
 10 and those are not the minutes. My understanding is those  
 11 are the typed -- those are typewritten notes -- well, I'd  
 12 have to look.  
 13 MR. GREEN: Taken by --  
 14 MR. SERYAK: It was on a count.  
 15 MR. GREEN: Right.  
 16 MR. SERYAK: There's another document that reflects  
 17 the minutes of that meeting.  
 18 MR. GREEN: There is?  
 19 MR. SERYAK: It's been produced. It's part of the  
 20 file.  
 21 MR. GREEN: Not produced to me. I have been produced  
 22 a handwritten copy of minutes; I have been produced this  
 23 (indicating) copy; and then a third copy which is this with  
 24 the parenthetical note "fleshed out." So if you have  
 25 another document, I would love to have it.

1 A That's right.  
 2 Q Do you recall why you spoke early on, as opposed to sitting  
 3 back and listening to what others might have had to say?  
 4 A No.  
 5 Q According to these notes, the first comment that's recorded  
 6 here is that you were not moved at all by what the  
 7 reviewers had to say. Do you remember making a statement  
 8 of that nature?  
 9 A No.  
 10 Q Do you remember as you sit here today whether you were  
 11 moved in any way by what the reviewers had to say?  
 12 A It depends on what you mean by "moved by." If you mean did  
 13 I think hard about they were saying, yes, of course, I  
 14 would have done that. If it means did I change my mind at  
 15 the end of the day, no.  
 16 Q Well, since they're not my words but are ascribed to you,  
 17 it's hard for me to interpret them for you. Had you used  
 18 that expression, what would it have meant to you?  
 19 A I would have meant at the end of the day I have the same  
 20 bottom line that I had.  
 21 Q Did you review the articles in question?  
 22 A Meaning did I read them?  
 23 Q Yes.  
 24 A Yes.  
 25 Q And did you form an opinion about their scholarship?

1 MR. SERYAK: Well, it was produced with the tenure  
 2 file.  
 3 MR. GREEN: It has never been produced in this  
 4 discovery. Are you telling me that there is such a  
 5 document?  
 6 MR. SERYAK: I mean, I'll check. My understanding  
 7 there is a typed-up version of the minutes. It's a  
 8 summary; it's a summary. It's not as detailed as the  
 9 notes.  
 10 MR. GREEN: Okay, because this (indicating) is what  
 11 was produced in response to the corporate notice.  
 12 MR. SERYAK: Well, you were asked to bring any  
 13 documents that were connected to the case.  
 14 MR. GREEN: Any minutes of that meeting. Yeah. All  
 15 right. Back to this.  
 16 Q According to the notes that were provided, after the  
 17 introduction, Professor White, Professor Green, and  
 18 Professor Relmann spoke. And they were all on the  
 19 majority. And then you were the next speaker. And I guess  
 20 the first question on that topic is, had you discussed with  
 21 anyone prior to this meeting whether you were going to try  
 22 and make a presentation early on?  
 23 A I don't remember.  
 24 Q All right. So you may have, you just have no recollection  
 25 as you sit here today?

1 A Yes.  
 2 Q And what was your opinion?  
 3 A My opinion was that they were weak.  
 4 Q Weak how?  
 5 A Weak in conceptualization; weak in execution; poorly  
 6 written; poorly argued. My sense of the written work was  
 7 that the author knew a lot of stuff and knew a lot of stuff  
 8 that was important and interesting, but was doing a very  
 9 poor job conveying what he thought to his reader.  
 10 Q And was that because you were having difficulty  
 11 understanding the import of the articles?  
 12 A Well, it's not my field, and so one always wonders. Among  
 13 many other reasons, that's why we get letters from people  
 14 who do this stuff. I usually think that I can tell the  
 15 difference between a clear argument and a blurry or opaque  
 16 or confusing argument, even if it's not stuff I, myself,  
 17 work on.  
 18 Q Okay. Did you form an opinion as to whether or not the  
 19 articles contained substance that was important to the  
 20 field?  
 21 A My impression was that -- if by "substance" you mean their  
 22 topic, my impression was, yes, they did.  
 23 Q How about the content, irrespective of the style?  
 24 A Well, when I say I was worried about the style, I don't  
 25 simply mean that the work was not graceful or elegant. I

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1 don't mean that I wouldn't put it on my shelf next to Henry  
 2 James or George Orwell, I mean that there was serious  
 3 problems simply dopping out what the meaning of sentences  
 4 and paragraphs was. So it's not just -- I'm not saying  
 5 that I think law professors ought to be elegant prose  
 6 stylists, though that's perfectly nice when it happens, but  
 7 it's not at all dispositive in this setting. I'm saying  
 8 that they ought to be able to clearly state, develop,  
 9 defend a position. And my worry about the style of these  
 10 pieces was not a worry about literary elegance, it was a  
 11 worry about clarity of exposition.

12 Q Okay. And, again, I don't think I will and I don't intend  
 13 to put words in your mouth. But the sense I'm getting is  
 14 that you read the articles, you were not favorably  
 15 impressed with them, and whatever the reviewers had to say  
 16 didn't move you from that position; is that accurate?

17 A No, I read the articles and was troubled by them and had  
 18 not at that point -- would never at that point form a  
 19 position that I would need to be moved away from. But the  
 20 more the committee deliberated, the more we spoke about the  
 21 work, the more we solicited internal and external views  
 22 from the work, the more I found that my initial impression  
 23 of the problems of the work was being confirmed.

24 Q And which reviews did you find confirmed your opinion?

25 A I remember being internally moved by J.J.'s statement in

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1 Q Did you discuss his potential tenure with anyone outside of  
 2 the meetings?

3 A I assume so, but I have no concrete memories.

4 Q Do you have any vague memories?

5 A No.

6 Q Do you recall talking with Omri Ben-Shahar about it?

7 A Omri was in Israel and flew back. And I was surprised to  
 8 see him at the meeting. I talked to him very briefly at  
 9 the meeting, but wouldn't have had an opportunity to talk  
 10 to him otherwise.

11 Q And you have no recollection of speaking with anyone else  
 12 about it?

13 A No.

14 Q How about Bill Miller?

15 A No.

16 Q Are you friends with Bill Miller?

17 A Oh, yes.

18 Q Do you see him socially?

19 A You mean outside the school?

20 Q Sure.

21 A Almost never.

22 Q But you consider him a friend?

23 A Yes.

24 Q Did he ever approach you on the topic of Peter Hammer's  
 25 potential tenure prior to the meetings in question?

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1 the 2002 file, a memo Sallyanne Payton wrote, though I  
 2 don't now remember which year she wrote it in, and a  
 3 statement Rich Friedman made orally. And among the  
 4 external letters, I remember being gravely concerned by the  
 5 letter from Einer Elhaug at Harvard.

6 Q What statement did Rich Friedman make orally that impressed  
 7 you?

8 A I don't now remember the actual content of what he said  
 9 about the work.

10 Q How long was his statement?

11 A I'd be guessing.

12 Q Give me your best estimate. I mean, was it the type of  
 13 thing that he made a 2-minute speech?

14 A No; no. It was, I would guess, 5 to 10 minutes.

15 Q And do you recall whether he was talking totally about the  
 16 scholarship as evidenced by the articles, or did he address  
 17 other topics as well?

18 A Certainly mostly about the scholarship. I don't recall now  
 19 whether it was exclusively about the scholarship.

20 Q Do you know Merritt Fox?

21 A Yes.

22 Q Did you discuss Peter Hammer's potential tenure with  
 23 Merritt Fox at any time either prior to or during the  
 24 meetings?

25 A I don't remember.

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1 A Not that I recall.

2 Q What's your relationship with Catharine MacKinnon?

3 A Cordial and not frequent; that is, one almost never sees  
 4 Kitty.

5 Q All right. At the time of the 2002 tenure meetings, who  
 6 was the senior-most member of the law and economics group?

7 A I don't know in part because it would depend on who you --  
 8 it's not as though we have a formal list of people who we  
 9 think of as the law and economics group. So it would  
 10 depend partly on who you were imagining as doing that sort  
 11 of work.

12 Q Well, who did you think the law and economics group  
 13 consisted of in 2002?

14 A I never posed myself the category law and economics group  
 15 one way or the other. If you would have asked me the  
 16 question then, I would have rounded up a bunch of names.  
 17 But I didn't walk around with a picture in my head of,  
 18 "There are people in the faculty and they are the law and  
 19 economics group."

20 Q So you have no concept as you sit here today of who might  
 21 have comprised that group?

22 A There are people in the faculty whose work is very  
 23 intensively in law and economics. There are other people  
 24 who sometimes do law and economics; sometimes don't. There  
 25 are some of us who use those tools occasionally, but not

1 reviews?  
 2 A Yes.  
 3 Q And J.J. White's report?  
 4 A The entire record before the faculty.  
 5 Q Of what significance was J.J. White's report to you?  
 6 A The majority report in 2002 struck me as leaning over  
 7 backwards to make the positive case. And so repeatedly it  
 8 deals with criticism and worries by saying things of the  
 9 form, "It would not be unreasonable nevertheless to believe  
 10 that," so on and so forth. And I mean, I've always thought  
 11 J.J. is not just very smart, but a blunt straight shooter  
 12 of a guy. And his report seemed to me to be -- more  
 13 decisively and crisply make the case on the merits. No one  
 14 enjoys denying somebody tenure. It's not easy to do. It's  
 15 not fun to do. And I understood the majority report to be  
 16 driven by the same worries all of us has, which is not to  
 17 say that I didn't believe at the end of the day that he  
 18 ought to get tenure. But J.J.'s report I simply found more  
 19 convincing on that score.  
 20 Q Understanding that this is hypothetical, had J.J. instead  
 21 agreed with the majority and recommended in favor of  
 22 tenure, would that have changed your position?  
 23 A I don't know. It would depend in part on what he said and  
 24 how he said it.  
 25 Q What if he relied on Merritt Fox and Merritt Fox's support

1 form and foundation.  
 2 MR. GREEN: That's fine.  
 3 A Yes.  
 4 Q Would you have deferred to him in terms of whether or not  
 5 Peter's work contributed significantly to the area of law  
 6 in which he was writing?  
 7 A If that means on the question where does this work sit as  
 8 against what other published work is out there that I don't  
 9 know anything about, yes.  
 10 Q How about in terms of the understandability of the  
 11 arguments that were being posed by Peter in his writings?  
 12 A Much less so, if at all.  
 13 Q What is the area of expertise you most frequently work in?  
 14 MR. SERYAK: I'm sorry. Most frequently what?  
 15 MR. GREEN: Work in.  
 16 A Political theory.  
 17 Q To what extent do -- or does the study of emotions play any  
 18 part in the work that you do?  
 19 A The book I published in 1998 has a chapter on -- the  
 20 setting here is England about 200 years ago. It has a  
 21 chapter on Insolence, Impudence, and Contempt and then --  
 22 and condescension -- and then goes on to consider contempt.  
 23 Q Other than that, do you teach any courses that focus in any  
 24 way on emotions?  
 25 A No.

1 of the tenure application? What if that was his basis?  
 2 MR. SERYAK: Let me just get the objection as to the  
 3 form of the question.  
 4 MR. GREEN: Sure.  
 5 Q Go ahead. You can answer.  
 6 A If he simply deferred to Merritt, that would interest me  
 7 very much. If he had things to say -- further things on  
 8 the merits to say along the lines of whatever Merritt had  
 9 said, which I don't now remember, that would have  
 10 interested me.  
 11 Q Do you remember of anything Merritt Fox said at the time of  
 12 the tenure meetings?  
 13 A No.  
 14 Q Would Merritt Fox have been considered the longest standing  
 15 member of those faculty members that were clearly law and  
 16 economics oriented?  
 17 A Probably.  
 18 Q Would he have had significant stature nationally in that  
 19 area?  
 20 A Yes.  
 21 Q He's now at Columbia?  
 22 A Yes.  
 23 Q Had he spoken openly in favor of Peter Hammer's tenure,  
 24 would that have impressed you?  
 25 MR. SERYAK: Again, let me get the objection as to

1 Q And when you talk about contempt, you're not using it in  
 2 the legal sense, you're using it in the social sense, I  
 3 take it?  
 4 A That's right.  
 5 Q Following the denial of tenure, did you have any  
 6 discussions with other faculty members about what their  
 7 votes were?  
 8 A Not that I remember.  
 9 Q Did you have conversations with other faculty members  
 10 concerning your justification for your vote?  
 11 A Not that I remember.  
 12 Q Did other faculty members disclose to you outside of the  
 13 two meetings why they voted however they may have voted on  
 14 Peter Hammer's tenure?  
 15 A Not that I remember.  
 16 Q After Peter Hammer filed his lawsuit, did you have  
 17 discussions with other faculty members about the  
 18 allegations in that lawsuit?  
 19 A Not that I remember.  
 20 Q When is the first time, if ever, you've become aware of the  
 21 nature of the allegations in Peter Hammer's lawsuit?  
 22 A Sometime over the last year, I suppose. I don't now  
 23 remember who told me, but somebody told me that the  
 24 complaint or some version of the complaint at some point  
 25 posted on the web had an item which clearly referred to