STATE OF MICHIGAN

COURT OF APPEALS

PETER J. HAMMER, Plaintiff-Appellant,	UNPUBLISHED December 3, 2013
v	No. 305568 Court of Claims
UNIVERSITY OF MICHIGAN BOARD OF REGENTS, Defendant-Appellee.	LC No. 04-000241-MK

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting a directed verdict for defendant. Plaintiff also challenges an earlier order granting summary disposition to defendant with regard to a separate count of the complaint. We affirm.

This case involves plaintiff's attempt to become a tenured faculty member at the University of Michigan Law School. Plaintiff was appointed as a tenure-track assistant professor on September 1, 1995. Plaintiff is gay, and Dean Jeffrey Lehman, who hired him, knew this at the time of the hiring. Plaintiff was considered for tenure in February 2000 but did not receive the required vote of two-thirds of the faculty present at the tenure meeting. However, he was given the chance of another tenure review in two years. On February 28, 2000, Dean Lehman sent a letter to plaintiff that stated, in part:

> As I told you last week, the faculty has deferred for two years a decision on whether to recommend your promotion to the Provost.
>
> This decision reflects three important collective judgments. First, the faculty has concluded that the research currently in your file does not support a decision to grant tenure. Second, the faculty is confident of your capacity to produce the quality of work required for tenure at Michigan. Third, the faculty values your contributions to the Law School enormously and is therefore willing to take the unprecedented step of deferring the tenure decision for <u>two</u> years in order to allow you sufficient time to do significant additional writing.
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> * * *

> Your current employment contract expires May 31, 2001. Because the faculty has deferred consideration of your tenure, your contract will be extended to May 31, 2002. If you are awarded tenure, you will receive a new contract; if not, the academic year 2001-2002 will be your terminal year. [Underlining in original.]

In response, plaintiff requested a further extension to his employment contract to give him time to find another job if it became necessary. Dean Lehman agreed in writing; plaintiff received an extension to May 31, 2003.

An additional tenure vote took place on February 28, 2002. There were 32 members present and 18 voted for tenure; therefore, plaintiff did not obtain the required two-thirds vote to obtain tenure. Dean Lehman telephoned plaintiff to inform him of the decision.

Two counts of plaintiff's complaint are at issue in this appeal. The first count, according to plaintiff's complaint, was based on "several documents in which the Defendant held itself out as an employer who [sic] would honor the diversity that the Plaintiff enjoyed by virtue of his sexual preference and in furtherance of honoring that diversity would provide full medical coverage to his domestic partner." Plaintiff alleged that the university "assured Plaintiff that he would not be the victim of discrimination based upon his sexual preference in his employment at the University of Michigan." The other count at issue, labeled "Count III" in the complaint,[1] alleged that the university had granted plaintiff "de facto tenure" by failing to provide plaintiff with proper notice of his termination, in violation of the university's bylaws and Standard Practice Guides (SPGs).[2]

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[1] Count II is not at issue in this appeal.

[2] University SPGs state, in part:

> All term appointments are considered terminal upon the completion of the terms and conditions of the appointment. However since for tenure track appointments, there is an expectation of possible reappointment, it is the intent of the University to notify individuals who are not to be reappointed, except as noted in paragraph 4 below [dealing with supplement instructional staff], in accordance with the following guidelines:
>
> A. Individuals who have held non-tenured regular full or part-time instructional staff appointments for more than two academic or fiscal years, expiring at the end of Term II, will be notified of non-reappointment no later than September 15 of that academic year. If the appointment expires at a time other than the end of Term II, notice will be given no later than a date which would provide nine (9) months advance notice of the termination date. . . .
>
> B. Individuals holding regular non-tenured full or part-time instructional appointments from one to two academic or fiscal years, expiring at the end of

On February 17, 2006, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing, with regard to Count I, that the university's general policy of "equal opportunity for individuals regardless of sexual orientation" did not amount to an actionable contract and that there was insufficient evidence, at any rate, to prove discrimination. With regard to Count III, defendant argued, in part, that the university's SPGs also did not amount to an actionable contract and that, at any rate, plaintiff had received adequate notice under the SPGs. Defendant also moved to dismiss the lawsuit for violations of MCR 2.114, alleging that plaintiff included allegations in his complaint, pertaining to certain allegedly hostile attitudes at the law school, that plaintiff knew or should have known were false. Defendant also filed a motion to strike plaintiff's affidavit, alleging that large portions of the affidavit were based on inadmissible hearsay and contradicted plaintiff's deposition testimony.

The trial court denied the motion to strike, the motion to dismiss based on MCR 2.114, and the motion for summary disposition without providing the reasoning behind its decisions.

Defendant filed a motion for reconsideration. Upon reconsideration, the trial court, during a hearing on July 27, 2006, stated that it was going to once again deny the motion to strike plaintiff's affidavits[3] in their entirety, but the court appeared to agree that substantial portions constituted inadmissible evidence. With regard to Count I, the trial court stated that there were questions of fact concerning whether certain representations had been made to plaintiff and regarding whether certain faculty members had been entirely candid about their reasons for voting against tenure. The trial court, in making this ruling, did not address whether it was relying on portions of plaintiff's affidavits that it had earlier characterized as problematic. With regard to Count III, the trial court reversed its earlier ruling and granted summary disposition to defendant, stating that even if there had been a "technical" violation of the SPGs, plaintiff had clearly been given actual notice of the decision to terminate.

Defendant sought interlocutory relief in this Court, and plaintiff cross-appealed with regard to Count III. This Court vacated the trial court's orders, stating in part:

> In light of the [court's] acknowledgment at the hearing on July 27, 2006, that portions of plaintiff's lengthy affidavits were inadmissible, the court is directed to reconsider defendant's motion to strike. The court shall consider plaintiff's affidavits only to the extent that their content is admissible as evidence, MCR 2.116(G)(6), and shall consider only those portions that were made on personal

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> Term II, will be notified of non-reappointment no later than December 15 of that academic year. In cases of appointment terminating at other times, notice will be given no later than a date which would provide five (5) months advance notice of the termination date. . . .
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> E. Notice of non-reappointment should be explicitly stated in writing from the appropriate Department Chairman or Dean. The letter should not be conditional, nor state reasons for the non-reappointment.

[3] Plaintiff had since filed another affidavit.

> knowledge, MCR 2.119(B). Opinions and hearsay do not satisfy the court rules. *SSC Associates Ltd Partnership v Gen Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The court thus must strike the inadmissible portions of the affidavits and clearly delineate which portions do not conform. After striking portions that are irrelevant and inadmissible, the court is to permit defendant to file a new motion for summary disposition. The case is REMANDED for further proceedings consistent with this order. [*Hammer v Bd of Regents of the Univ of Michigan*, unpublished order of the Court of Appeals, entered January 25, 2007 (Docket No. 272801).]

Given that this Court had vacated the trial court's orders in their entirety, the parties then filed cross-motions for summary disposition with regard to Count III, and defendant filed a motion for summary disposition with regard to Count I. On March 3, 2008, the trial court denied both motions with regard to Count III, with the court stating, in part, "I think there's a fact question surrounding it, you know what people said." The court made mention of the fact that the SPGs used the word "should" in referring to the allegedly required notice, but the court nevertheless stated, "I think there is a fact question . . . ."

Before the trial court ruled on defendant's motion concerning Count I, the university withdrew its position concerning the enforceability of the non-discrimination policy that formed the basis of Count I. In other words, defendant acceded that its policy could provide a basis for a lawsuit based on discrimination relating to sexual orientation. As a result, defendant's briefing changed course in some respects; defendant now focused solely on its argument that there was insufficient evidence of discrimination to proceed. The case had also changed in another respect, because the trial court followed this Court's earlier directive and had stricken many portions of plaintiff's latest affidavit.[4] The trial court stated in part:

> [It] has not been shown to this [c]ourt's satisfaction, any document that sexual orientation was a factor in the outcome. . . . [S]urrounding the tenure meetings in February of 2002, the focus -- there's no reason, or nothing that I can see, no reason to believe that the focus was anywhere other than on the scholarship. And, interestingly the Defendant has noted that one gay faculty member voted against tenure for that very reason. Other gay members, I understand there's argument and discussion, but they disagree with [plaintiff's] conclusions that the law school environment there is biased against homosexuals. And, the people who voted for the tenure make no reference to any bias, in terms of that deliberative process, the consideration process. It's simply not there.

The court noted that the evidence supported that the tenure meeting on February 28, 2002, during which the final vote was taken, was focused on academics and there there was no reason to believe "lifestyle" played any role. The court noted that there was some dispute

[4] In this opinion we rely on the portions deemed admissible, considering that plaintiff raises no issue arguing that the trial court made erroneous rulings concerning the affidavit.

concerning the number of faculty present, with defendant arguing that 32 members were present and that the final vote was 18 for tenure. The trial court noted that it would, for purposes of the motion, take plaintiff's position that there were only 30 members present, with a final vote of 18 to 12.[5] The court concluded that the correct way of viewing the issue would be to "discount persons" for whom there was any evidence of anti-gay bias. As noted, tenure is awarded if one receives a favorable vote from two-thirds of those present, and thus the court stated that "the burden on the Plaintiff would be to disqualify three of those no votes in order to succeed." (This would result in a vote of 18 to nine, and 18 is two-thirds of 27, the total of 18 and nine.) The court made very lengthy and detailed findings and concluded that there was a question of fact concerning only one faculty member, Kyle Logue. The court emphasized that, in general, plaintiff's allegations amounted to sheer speculation.

Plaintiff filed a motion for rehearing, citing an affidavit in which a Lucia Saks stated that Reuven Avi-Yonah, a tenured law-school faculty member, had overheard two tenured faculty members discussing plaintiff's tenure, with one of them stating that he would not vote for plaintiff because he was gay. Avi-Yonah denied this allegation at deposition. The trial court denied the motion for rehearing, stating that plaintiff was "rehashing" issues and that plaintiff was simply now offering hearsay.

In the meantime, defendant filed an additional motion for summary disposition with regard to Count III, citing a recent decision of this Court, *McCahan v Brennan*, 291 Mich App 430; 804 NW2d 906 (2011).[6] The trial court[7] declined to rule on the motion, deeming it untimely, but indicated that defendant could renew its arguments at the close of plaintiff's proofs at the bench trial. At the close of plaintiff's proofs, defendant moved for a directed verdict. The trial court granted the motion, finding that it was undisputed that plaintiff had received written notice, by way of Dean Lehman's letter, that his appointment was going to end on May 31, 2002. The trial court noted that plaintiff had received an additional year's appointment at his own request "and now wants the [c]ourt to hold the University accountable by saying, well, they didn't send me another notice, which was only based on my request and the University's accommodation. I'm just not persuaded by that." The court stated:

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[5] The discrepancy arose because the secretary taking notes recorded the tally as 18 to 12. However, she submitted an affidavit on December 7, 2007, in which she clarified that 32 faculty members were present at the meeting and that 18 voted for tenure, 12 voted against tenure, and two abstained from voting.

[6] This case involved, in part, the notice requirements for bringing an action in the Court of Claims. The trial court did not end up definitively ruling on the *McCahan* issue because it resolved the instant case on other grounds.

[7] The original trial judge, James R. Giddings, had retired by this point and Clinton Canady, III, had taken over the case.

> So for our standpoint, then, in starting in 2000, he knew his end year was going to be 2002, initially. He then got an extension at his request. So he clearly knew as early as 2000. I find that that constituted notice, and that Professor Hammer's actions were in accordance with that notice, that the review came up in February 2002. He didn't get it. He knew that . . . he needed to find other employment. He immediately took action to look for other employment. And, in fact, secured other employment. . . .

In making his argument, plaintiff had relied, in part, on University By-Law 5.09, which states, in part: "The procedures [including a hearing] prescribed in this section shall be followed . . . (b) before recommendation is made to the Board of Regents of dismissal, demotion, or terminal appointment of a teaching staff member holding appointments with the University for a total of eight years in the rank of full-time instructor or higher." Plaintiff states in his appellate brief:

> By-Law 5.09, SPG 201.88 and SPG 201.13 are attached. Taken together, they provide that a non-tenured teaching staff member who accumulates 8 years of academic appointments may only be terminated "for cause" following a pre-termination hearing, or, put another way, can only be terminated under such circumstances and with such processes available to him/her as are available to tenured faculty members[,] thus the colloquial term *de facto* tenure. The exception to the rule is if a written, non-contingent notice of non-reappointment is given after the denial of tenure and no later than September 15th of the terminal year of employment.[8]

The trial court found that "accumulation would have meant Professor Hammer would have had to have completed eight years." The court found that he had not and that this provided an alternative basis for the granting of a directed verdict. The directed verdict resolved the last pending claim, and the present appeal followed.

This Court reviews de novo a trial court's grant or denial of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8

[8] In other words, if adequate notice of termination is not provided, then a professor with eight years of service is essentially "transformed" into a tenured professor.

(2008). The standard of review for a directed verdict is materially similar. See *Johnson v Purex Corp*, 128 Mich App 736, 739; 341 NW2d 198 (1983).

Plaintiff argues that the trial court erred in granting summary disposition on Count I when it had earlier denied this relief in connection with an original motion and a related motion for reconsideration. However, plaintiff cites no evidence to support the proposition that a court may not rule differently on a motion when it is presented again at a later stage in the proceedings. An appellant may not leave it to this Court to search for authority to sustain his position. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In fact, an action such as the trial court's is allowable. See, generally, *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). Moreover, the motion had changed posture somewhat at the time of the trial court's reevaluation, in that (1) portions of plaintiff's affidavit had been stricken in accordance with this Court's directive and (2) defendant had refocused its strategy in part, by dropping the argument that the university's nondiscrimination policy did not provide a basis for a cause of action. The trial court did not act improperly in reaching a conclusion different from its earlier conclusions.

Plaintiff also appears to be arguing that this Court's January 25, 2007, order somehow precluded a grant of summary disposition to defendant on Count I. This is patently untrue, seeing as the order specifically notes that defendant was to be allowed to file a new motion for summary disposition. The order did not limit this permission to certain counts of the complaint.

Regarding the substance of the motion, plaintiff, in his main appellate brief, offers no case law or other authority regarding the legal standards under which his claim of discrimination should be evaluated. His briefing is deficient. *Peterson Novelties, Inc* 259 Mich App at 14. At any rate, plaintiff below analogized his lawsuit to claims under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., and also does so in his reply brief on appeal. Accordingly, plaintiff, to survive summary disposition, must have shown that discrimination was a motivating factor in the adverse employment decision. *Hazle v Ford Motor Co*, 464 Mich 456, 465; 628 NW2d 515 (2001).

Significantly, in a brief filed below, plaintiff argued in favor of the trial court's method of simply "voiding" any votes that may have been tainted by anti-gay bias, and he does not argue against this method on appeal. Moreover, despite the trial court's statements, we find that the record reveals no genuine issue of material fact with regard to the conclusion that 32 faculty members were present for the tenure meeting. Accordingly, to obtain relief in accordance with the method he himself advocated, plaintiff must show that there are issues of fact concerning discrimination with respect to at least five faculty members (because if five "no" votes are ignored, the final tally would be 18 to nine [counting the two abstentions], and 18 is two-thirds of 27).

Plaintiff has not met this burden. He recites, in the argument portion of his brief, certain incidents that he believes reflect discrimination. One incident, involving an alleged comment about a lesbian couple using a "turkey baster" to get pregnant, was specifically designated as inadmissible evidence by the trial court when it reviewed plaintiff's affidavit. For another incident, allegedly involving a professor asking plaintiff how his "wife" was, plaintiff does not

indicate who this professor was and whether he or she had a role in the tenure decision. Another incident, allegedly involving Professor James White questioning plaintiff about what the children of plaintiff's partner's extended family called him, provides no indication of discriminatory animus, and we note that Professor White was not present at the tenure meeting at any rate. Plaintiff identifies another incident as follows: "One professor would give awkward hallway lectures to students about gay rights, using Hammer as his shill." We fail to see how this demonstrates a discriminatory animus. Plaintiff also states that a professor commented that there were too many "gay and Israeli people" on the faculty, but plaintiff cannot identify who this professor was or whether he or she participated in the tenure decision.

Plaintiff next makes several arguments concerning specific professors who voted or recommended against tenure. Plaintiff states that Richard Friedman's credibility was at issue because he (1) wrote to friends at Ohio State University three weeks after the tenure vote indicating that plaintiff was a "mover and shaker and leader" in his field; (2) advocated, before the first tenure vote in 2000, for a change in the tenure policy to prevent grievances; and (3) "replied with a one word expletive" when he heard that plaintiff was requesting employment documents for review. We fail to see how any of these actions demonstrate or imply any anti-gay bias, especially given that Friedman was assisting plaintiff in his job search by writing the Ohio State email and also stated in the email that "opinions differ" concerning plaintiff's scholarship.

With regard to Sherman Clark, plaintiff appears to be arguing that his credibility was called into question because, according to plaintiff's interpretation of his deposition testimony, he "backtracked" concerning his pro-life views. We fail to see how this has any bearing on the question of anti-gay bias.

With regard to Carl Schneider, plaintiff argues that he lied about his alleged anti-gay-marriage stance. Schneider testified at deposition that he did not have a belief one way or another regarding whether same-sex marriages should be legal. Plaintiff contends that Schneider was lying because he had written books and articles that allegedly expressed anti-gay-marriage views. Plaintiff additionally contends that Schneider was not credible because he stated that he did not consider himself an expert in family law. Even assuming that the books and articles could be characterized as expressing Schneider's own personal views about gay marriage, the excerpts emphasized by plaintiff were temporally distant from the tenure decision and from the deposition date.[9] We also fail to see how Schneider's credibility was called into question by his stating that he no longer considers himself an "expert" on family law. Indeed, he satisfactorily explained at deposition that he stopped teaching family law "10 or 15 years ago" and that he "almost never write[s] in the area any [longer]." Below, plaintiff cited an article issued by the

[9] In addition, plaintiff himself states that "it wasn't so much whether [Schneider was] against gay marriage, for example, but rather, in the context of a case in which [his] motivation was at issue, [he] decided [he] needed to conceal [those] beliefs by lying under oath." There is simply no evidence that Schneider lied under oath.

"Council on Family Law" in 2005, but Schneider is simply listed as a member of the Council, not as an author, and there is no basis from which to conclude that Schneider lied.

With regard to Kyle Logue, plaintiff agrees with the trial court's assessment that there was a question of fact concerning his credibility and thus his motivation for voting against tenure. We conclude that it potentially stretches credibility for Logue to have admitted that he is a member of the Huron Hills Baptist Church and for Logue to have taught Sunday school there but to have answered "I don't know" when asked if his church condemns homosexuality or whether homosexuality is contrary to the teachings of the Bible. Although Logue testified that he personally does not believe that homosexuality is "an abomination," giving the benefit of all reasonable doubt to plaintiff, it is arguable that his credibility was compromised by his answers to the additional questions.

With regard to Don Herzog, plaintiff claims that his testimony was not credible, partly because he attributed his negative tenure vote to earlier statements by Thomas Kauper about plaintiff's scholarship, even though Kauper had written glowing reviews of plaintiff's work. However, even assuming that Herzog was mistaken about Kauper's views, plaintiff presents no evidence that Herzog was motivated by anti-gay bias. Plaintiff implies that because William Miller described Herzog, in the credits of Miller's book on the topic of "disgust," as being of like mind on issues pertaining to disgust, Herzog must have an anti-gay bias. This is, frankly, an absurd assertion. Miller wrote a book dealing with the concept of disgust, but plaintiff provides no evidence that in this book Miller expressed personal anti-gay views.

With regard to William Miller, plaintiff emphasizes another book he wrote in which he described homosexuals as pariahs. However, Miller clarified at deposition that in this book he was describing societal views, not his own views, and that he personally had no anti-gay bias. Plaintiff also emphasizes that Miller admitted that, in having a verbal conversation about the concept of disgust, he may have used the example of two men kissing in public as something that disgusts him. Admittedly, this statement provides a possible basis for an inference of bias, although Miller went on to explain that his views were more nuanced and that public displays of heterosexual kissing disgust him, as well. We must view the evidence in the light most favorable to plaintiff, however. Even doing so, plaintiff has still not met his burden of establishing a prima facie case, given that he has showed an issue of fact regarding bias concerning only two professors.[10]

[10] In the argument portion of his brief plaintiff does not discuss Dean Lehman and thus has evidently abandoned any argument that Lehman was biased. At any rate, plaintiff at one point had tried to paint Lehman as biased by pointing out that, when Lehman was president of Cornell University, he had been willing to allow military recruiters on campus despite the federal policy of "Don't Ask, Don't Tell." As noted by the trial court, inferring anti-gay bias from this is "way beyond a stretch." Finally, we note that we are disregarding as hearsay the affidavit of Lucia Saks; plaintiff does not argue on appeal that this affidavit did not constitute hearsay.

The evidence shows that plaintiff was denied tenure based on his scholarship. Plaintiff has not met his burden of establishing a genuine issue of material fact that he was denied tenure because of anti-gay bias.

Plaintiff next argues that the trial court should have granted his motion for summary disposition concerning Count III of the complaint. We disagree and find that the court properly granted a directed verdict to defendant. As noted, the SPGs state, in part:

> All term appointments are considered terminal upon the completion of the terms and conditions of the appointment. However since for tenure track appointments, there is an expectation of possible reappointment, it is the intent of the University to notify individuals who are not to be reappointed, except as noted in paragraph 4 below [dealing with supplement instructional staff], in accordance with the following guidelines:
>
> A. Individuals who have held non-tenured regular full or part-time instructional staff appointments for more than two academic or fiscal years, expiring at the end of Term II, will be notified of non-reappointment no later than September 15 of that academic year. If the appointment expires at a time other than the end of Term II, notice will be given no later than a date which would provide nine (9) months advance notice of the termination date. . . .
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> B. Individuals holding regular non-tenured full or part-time instructional appointments from one to two academic or fiscal years, expiring at the end of Term II, will be notified of non-reappointment no later than December 15 of that academic year. In cases of appointment terminating at other times, notice will be given no later than a date which would provide five (5) months advance notice of the termination date. . . .
>
> E. Notice of non-reappointment should be explicitly stated in writing from the appropriate Department Chairman or Dean. The letter should not be conditional, nor state reasons for the non-reappointment.

Even assuming, without deciding, that the SPGs provided an actionable contract, plaintiff did in fact receive written notice of his termination date by way of the correspondence with Dean Lehman. Plaintiff complains that this notice was "conditional" because it depended on whether plaintiff was denied or granted tenure. However, paragraph E above states that the notice "should" not be conditional. The word "should" does not carry an obligatory effect when read in context with other words that clearly do carry such an effect. See, generally, *People v Fosnaugh*, 248 Mich App 444, 455; 639 NW2d 587 (2001) (discussing "should" and "shall"). Here, the SPGs employ the term "will," which is defined, in part, as "am (is, are, etc.) expected or required to" by Random House Webster's College Dictionary (1997), and at the same time employ the term "should," thus conveying different meanings. See also *Branham v Thomas Cooley Law School*, 689 F2d 558, 562 (CA 6, 2012) ("should" denotes a suggestion but not a requirement). Cf. *Weckerly v Mona Shores Bd of Ed*, 388 Mich 731, 734; 202 NW2d 777 (1972) (involving the word "shall").

Moreover, it is undisputed that plaintiff did not serve as a professor for eight years or more. Plaintiff essentially contends that one must have only been granted eight years of appointments to fall within the provision of the bylaws at issue, even if some of the years had not yet been spent actually performing as a professor. This is nonsensical. As aptly stated by defendant in its appellate brief:

> The University's position is that a person must *complete service of* those eight years of tenure-track appointments and *remain with the University thereafter* in order to be entitled to the hearing provided in Bylaw 5.09. The University's interpretation of the Bylaw is the only reasoned approach possible. By Plaintiff's interpretation, a person who receives successive appointments of three years, three years, and two years, would be able to invoke the hearing rights of Bylaw 5.09 at the start of his seventh year of appointment, as he "had" eight years of appointments on paper. This would create the absurd result that someone could receive the hearing protection of Bylaw 5.09, only to have the University rescind it by sending appropriate notice of non-reappointment. [Emphasis in original.]

The only reasonable interpretation is that a professor must have served eight years of appointments, and plaintiff did not do so. This provided an alternative basis for the grant of a directed verdict.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan