

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

C. MARTIN GASKELL,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO. 09-244-KSF
vs.)	
)	
UNIVERSITY OF KENTUCKY,)	
)	
Defendant.)	
)	

MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56(a) AND (d)(2)

I. INTRODUCTION

Summary judgment motions by *plaintiffs* in Title VII cases are as rare as hen’s teeth. But in this case, where the head of the Search Committee charged with picking an Observatory Director for the University of Kentucky’s student observatory wrote regarding the rejection of Martin Gaskell’s application that “no objective observer could possibly believe that we have excluded Martin on any basis other than religious” (Troland Dep. Ex.16), and where the *de facto* decision maker has admitted that an in-house debate about Gaskell’s beliefs and his public expression of them was “an element” in the decision (Cavagnero Dep., 199:18 to 200:5), an attorney would be remiss, if not downright negligent, were he *not* to move for partial summary judgment on the issue of whether or not Gaskell’s religion was “a motivating factor” in the challenged decision. In short, this hen has teeth.

As demonstrated herein, the discovery and disclosure materials produced by the defendant itself reveal a search and decision process marred by discussion of applicant Gaskell’s religious beliefs, fear that he was “potentially evangelical”, numerous references to his “freedom

of religion,” inquiry to his previous employer about his religious beliefs, concerns expressed about Gaskell’s willingness to publicly identify himself as a religious believer, and speculation about what members of the press and public might think should UK hire an individual of Gaskell’s (supposed) religious beliefs. All of this resulting in the rejection of an applicant described by the search committee chair as “superbly qualified, so breathtakingly above the other applicants in background and experience” in favor of one with practically no relevant experience.

Plaintiff brings the present motion pursuant to 42 U.S.C. § 2000e-2(m), the so-called “mixed-motives” provision of Title VII. In doing so, plaintiff does not intend to waive his right to pursue a “single-motive” claim at trial on the grounds that — in the words of UK’s agent — “no objective observer could possibly believe that we [UK] have excluded Martin on any basis other than religious.” But, at a minimum, based on the virtual admissions by those who made the challenged decision, and the extraordinary volume of damning evidence produced by defendant itself, it would be a manifest miscarriage of justice to permit a trier of fact to speculate on the question of whether or not Gaskell’s religion was “a motivating factor” in UK’s decision “even though other factors also motivated the [decision.]” 42 U.S.C. § 2000e-2(m).¹

II. FACTUAL BACKGROUND

The process of selecting an Observatory Director for UK’s new student observatory began in June, 2007 with the posting of an advertisement on the job register of the American Astronomical Association, the leading organization of astronomy professionals. The process ended in November, 2007, with the hiring of Timothy Knauer, but only after two members of the Physics & Astronomy Department had gone to the UK Equal Employment Office with

¹ This section enables an employer to limit a plaintiff’s remedies to declaratory relief, injunctive relief, and attorney’s fees but only when the defendant-employer proves it would have taken the same action in the absence of the impermissible motivating factor. *White v. Baxter Healthcare*, 533 F. 3d 381, 397 (6th Cir. 2008).

complaints that the hiring process had been plagued by religious discrimination against plaintiff, Martin Gaskell. One of the complainants, Search Committee Chair Thomas Troland described the process as “indefensible” from a moral perspective, “unconscionable,” a decision that “brings shame upon all who were part of it,” shattering his “belief in the University of Kentucky and its commitment to fairness and diversity.” (Troland Dep., Ex. 45.)

To understand what could have produced such an extraordinary reaction from Troland and others familiar with the process,² a somewhat detailed recitation of the essentially undisputed facts is in order.

A. The MacAdam Student Observatory

For nearly five decades prior to 2007, the University of Kentucky did not have an astronomical observatory. After many years of prodding by longtime UK Professor Keith MacAdam, among others, the school decided to build a student observatory on the grounds of its Lexington Campus. The observatory bears Professor MacAdam’s family’s name in recognition of his role in persuading the university to go forward with the project. In addition, Professor MacAdam made important financial contributions toward getting the project off the ground. (MacAdam Dep., 8:10-16.)

The project began with the Chair of the Department of Physics & Astronomy, Professor Michael Cavagnero forming an Observatory Committee to design the observatory, oversee its construction, and search for and hire a Founding Director. Sometime prior to the Observatory Committee actually starting its work, Professors MacAdam and Cavagnero had visited with Professor Martin Gaskell (the plaintiff in this case) at the University of Nebraska-Lincoln

² Troland’s reaction was positively low-key compared with that of Professor Gary Ferland who warned his colleagues that their consideration of Gaskell’s religious beliefs smacked of “McCarthyism,” and told Troland he thought the University of Kentucky was engaging in “a form of Nazi behavior.” (Troland Dep., Ex. 30.)

(hereinafter “UNL”). Gaskell had been responsible for obtaining the funding, overseeing the design and construction, and eventually running UNL’s student observatory, a facility which was built on top of a campus parking garage. This latter idea appealed to both MacAdam and Cavagnero who had been struggling with finding a spot on UK’s campus for an observatory; Gaskell “helped raise our enthusiasm for the project.” (Cavagnero Dep., 21:3 to 22:17.)

B. The Observatory/Search Committee

1. *The Decision Making Process*

In addition to Cavagnero, an ex-officio member due to his position as department chair, the following people made up the Observatory Committee: Professor Gary Ferland, Professor Thomas Troland, Professor Keith MacAdam, Professor Nancy Levenson, Professor Isaac Shlosman, and staff members Steve Ellis and Sally Shafer. All were members of the Physics and Astronomy Department. Until he left on sabbatical sometime in August, 2007, Professor Ferland served as the chair of the Observatory Committee.

Once the actual construction of the observatory was underway, the committee’s next task was to find someone to run it. Rather than create another committee for the process of searching for a director, Cavagnero “just charged the existing observatory committee with the additional responsibility of performing the search and advising the chair on candidates for the search.” (Cavagnero Dep., 23:15 to 24:5.) In the absence of Professor Ferland, Cavagnero named as Chair of what was now the Search Committee,³ Professor Thomas Troland, a member of the department since 1981.

Troland summarized the work of the Search Committee as follows: to review applications, to interview candidates, to discuss their qualifications, and to arrive at an advisory

³ The UK witnesses, in documents and depositions, use the terms “Search Committee” and “Advisory Committee” interchangeably.

opinion to be forwarded through the chair (Cavagnero) to the dean (Steven Hoch). (Troland Dep., 15:2-8.) Cavagnero explained the process thus: “the chair receives advice from the committee, and the chair gives advice to the dean, and the dean actually is the person who has the hiring authority. That’s the way it’s supposed to work.” (Cavagnero Dep., 25:20-24.)

But however the process is “supposed to work,” according to Dean Hoch the decision on the job of Observatory Director was made “functionally” by one person: Mike Cavagnero. (Hoch Dep., 22:3 to 23:5.) As Hoch explained, “he [Cavagnero] had a search committee, the search committee made a recommendation to him. It would have been Mike’s authority to accept that decision or reject it . . .” (*Id.*) Hoch said that the role of the dean’s office in such matters “is just a rubber stamp, just a formality.” (*Id.*)

2. The Work of the Search Committee

The Committee carried out its work over the course of about four months, starting with the placing of the American Astronomy Association advertisement in July, 2007, and ending with a formal vote and recommendation in favor of Timothy Knauer on October 23, 2007. (Cavagnero Dep., Ex. 41.) In between, the committee reviewed applications and supporting documentation, conducted telephone and on-campus interviews of a number of finalists, and held anywhere from six to ten formal committee meetings. (MacAdam Dep., 9:19-22.)

Although more than a dozen people applied for the Observatory Director job, in the end the decision came down to a choice between plaintiff Martin Gaskell and Timothy Knauer. Ultimately, the official committee vote on the recommendation was four in favor of Knauer to one in favor of Gaskell, although Cavagnero reported to the dean that the actual vote was “rather closer” if one counted a vote emailed from Professor Levenson in favor of Gaskell and the expression of support for Gaskell by Professor Ferland. (Cavagnero Dep., Ex. 42.)

3. Gaskell's and Knauer's Qualifications Compared

The advertisement of the Observatory Director position listed a minimum requirement of an M.S. degree and gave a “job summary” which may be paraphrased as follows: (1) making the observatory fully functional; (2) develop CCD imagery and spectroscopy for use by advanced students; (3) supervising two grad students to work with the Director in using the observatory and the public; (4) teach some evening sections of introductory astronomy; (5) suggest and develop activities that make effective use of the observatory for astronomy students and K-12 students; (6) be able to set up and operate a modern 20” telescope; have good communication skills; and (7) be able to manage the facilities budget. (Gaskell Dep., Ex. 1.)

In addition to the requirements set forth in the ad, in an email to the Search Committee dated August 20, 2007, Cavagnero added four “other desirable qualities”: (1) ability to conduct research projects with undergraduate majors; (2) ability to pursue funding for K-12 teacher education through a program called PIMSER; and (3) ability to pursue funding for undergraduate research. Cavagnero also pointed out that items (2) and (3) “would probably require a Ph.D.” (Troland Dep., Ex. 5.) Applicant Gaskell had a Ph.D. Timothy Knauer did not.

Early on in the process, having reviewed applications from various candidates, Cavagnero wrote to the committee that “Martin Gaskell is clearly the most experienced . . .” and pointed out that “Keith [MacAdam] and I visited him last year to learn how to build an observatory on a parking structure.” (Troland Dep., Ex. 4.) A few weeks later, Troland wrote the committee that Gaskell “has already done everything we could possibly want the observatory director to do.” (Troland Dep., Ex. 5.)

The defendant has supplied a useful chart that clearly illustrates what Cavagnero and Troland were talking about. (Shafer Dep., Ex. 1.) The document was prepared before interviews

were conducted. The second page contains the data concerning both Gaskell and Knauer and — it can hardly be disputed — Gaskell appears to easily outrank Knauer in every category. (Shafer Dep., Ex. 1.)

On September 24, 2007, *after* telephone interviews had been completed, the committee ranked the leading candidates on an objective scale, assigning a number score to each of five job criteria. By vote of the entire Search Committee, Gaskell came in first among seven applicants; Knauer tied for third. (Cavagnero Dep., Ex. 20.)

4. *The On-Campus Interviews*

Gaskell came to Lexington for a series of on-campus interviews on October 10, 2007. He met with most of the members of the Search Committee, some teaching assistants, two associate Deans of the College of Arts and Sciences, and the Director of Undergraduate Studies, Professor Mike Kovash. (Several of the advertised job requirements dealt with developing undergraduate studies and pursuing funding for same, both areas that fell within Kovash’s purview.)⁴

Some of the people who interviewed Gaskell that day came away with less favorable impressions of Gaskell than they had of Knauer. For instance, MacAdam complained that Gaskell acted “as though he thought the job was his.” (MacAdam Dep., 22:12-16.) It may not have helped Gaskell’s cause that, as a result of his tour of the observatory that day, he pointed out several significant design flaws, including possible OSHA and ADA violations and the fact that the main telescope was positioned in such a way as to make it impossible to observe some 40% of the sky! (Troland Dep., Ex. 30.) MacAdam had been the primary designer of the facility.

⁴ Kovash would later complain to UK’s EEO office that Gaskell had been the victim of discrimination and that UK was engaging in “spin control” over the whole process.

As for Shafer, who later would testify that the on-campus interviews were all but decisive for her, her written notes of her interviews with Gaskell, Knauer and a third applicant (Sykes) actually show that she had many positive and negative things to say about both Gaskell and Knauer. Amusingly, she reports that Gaskell — a man she had never met before — “likes to dominate conversations” but “was on good behavior for the interview.” (Shafer Dep., Ex. 2.)

Committee Chair Troland took the opposite view, and Kovash — who interviewed only Gaskell and Knauer during this process — reported to the committee that Gaskell “had a significant edge” over Knauer on all counts. (Troland Dep., Ex. 25.)

5. The Search Committee Makes a Recommendation

Having reviewed application materials, conducted telephone and on-campus interviews, the Search Committee met on October 16, 2007, to discuss the observatory director applicants.⁵ As Troland reported, “no consensus developed regarding a leading candidate, and no hiring recommendations came out of this meeting.” (Troland Dep., Ex. 26.) One week later, however, without the benefit of any additional interviews or application materials from the finalists themselves, the committee took a vote. Four of those present recommended that Knauer be hired. One member, Troland, voted that Gaskell be offered the position.⁶ Cavagnero asked Troland to draft a report to be forwarded to the Dean along with Cavagnero’s own analysis. (Troland Dep., Ex. 40.)

Troland’s report contains a summary of the opinions of both the majority (Knauer) and

⁵ In addition to Gaskell and Knauer, the committee interviewed a third “finalist,” one Sykes, who seems to have been no one’s first choice and ultimately received no votes.

⁶ As previously noted, Cavagnero considered the vote to be actually 4-3 in favor of Knauer by including an email vote by the absent Professor Levenson, as well as the views of Professor Ferland.

minority (Gaskell) viewpoints. (*Id.*) Troland circulated his draft to the other committee members for comments. Since, as Troland recollects, no members of the committee challenged his recital of the facts in his dissenting opinion as factually incorrect (Troland Dep., 102:18-25), it is worth quoting in full:

Gaskell is a Ph.D. astronomer with 26 years of post doctoral experience in academic institutions. Gaskell has already established a similar student observatory at the University of Nebraska. He has worked extensively with undergraduate students at all levels (including upper level graduate research). He has had considerable experience with planetarium shows and telescope making workshops.

Knauer, in comparison, has had little or no experience with optical observatories nor with undergraduate astronomy research nor with astronomy outreach, nor has he ever been employed in an astronomy-related position other than as a part-time astronomy instructor at UK.

(Troland Dep., Ex. 40.)

6. Cavagnero Adopts the Committee's Recommendation

On October 26, 2007, Mike Cavagnero forwarded to Dean Hoch Troland's report of the Search Committee's recommendation along with his own analysis of the matter and endorsement of the committee's choice of Knauer. (Cavagnero Dep., Ex. 42.)⁷ In his report, Cavagnero tells the Dean he fully supports the "conclusion of the majority that Tim Knauer be hired for this position." (Cavagnero Dep., Ex. 42.) He emphasizes Knauer's enthusiasm for the job and creative ideas, while acknowledging that, unlike Gaskell, Knauer had no experience running an observatory, begged off teaching assignments for at least the first year, was not in a position to lead undergraduate research "which Martin Gaskell could, and so will not be as big a boost to our undergraduate majors program, at least initially." (*Id.*) Nevertheless, Cavagnero endorsed

⁷ For some reason, this obviously critical document — containing the analysis and hiring recommendation of Cavagnero, the *de facto* decision maker in this process — has only been made available to plaintiff in a version forwarded to Cavagnero from James Krupa, an Associate Professor in the UK Department of *Biology*. Cavagnero was unable to explain this "mystery." (Cavagnero Dep., 203:4-23.)

the majority's view that Knauer would "grow into" the several areas of the job description he was apparently unqualified to fulfill when hired. (*Id.*)

Completely absent from either the Search Committee's report, (Troland Dep., Ex. 40), or Cavagnero's report, (Cavagnero Dep., Ex. 42), is any mention of the one issue that brought forth from Troland, Ferland, and Kovash the fervid denunciations of the whole process quoted above. No McCarthyism, no Nazis, no spin control. No hint, in fact, of what Troland described as the one issue that "everybody saw" and "everyone talked about." The "elephant in the room": Martin Gaskell's religion. (Kovash Dep., Ex. 2.)

C. The Elephant in the Room

1. *Martin Gaskell the Scientist*

Long before Martin Gaskell applied for the Observatory Director position at UK, he was already an internationally recognized and respected astrophysicist with a curriculum vitae that, in the words of UK's Troland, "would put to shame many members of our faculty." (Troland Dep., Ex. 28.) Even a cursory review of his credentials leaves one unable to know whether to laugh or cry at the comment attributed to Dean Hoch, a specialist in Russian History, that Gaskell's "views on the scientific method make him unworthy of a scientific position at UK." (Hoch Dep., Ex. 1.)

Born and raised in England's West Midlands, Gaskell received his bachelor's degree from the University of Edinburgh, Scotland, and did graduate work at the University of California at Santa Cruz, obtaining his Ph.D. in 1981. He was a post-doctoral fellow at Cambridge University in England before returning to the U.S. He has taught at a number of universities in America, his longest stint being the fifteen years he spent at the University of Nebraska-Lincoln, where, among other things, he initiated, oversaw the design and construction

of, and ran the Student Observatory that “helped raise the enthusiasm” of UK’s Cavagnero and MacAdam for Kentucky’s Student Observatory. (Cavagnero Dep., 21:3 to 22:17.)

In addition to doing “everything [UK] could possibly want the observatory director to do,” (Troland Dep., Ex. 5), Gaskell (as of 2007) had published more than one hundred papers in refereed journals and conference books; forty-five abstracts of presentations at scientific meetings; twenty-four editorials in scientific journals, and “minor publications,” and was principal author of two books. (Troland Dep., Ex. 2.) Gaskell’s area of concentration is the study of quasars, “tremendous outpourings of energy from around supermassive black holes in the very centers of galaxies.” (Troland Dep., Ex. 14.) As of 2007, his scientific publications had been cited over 4,300 times by his peers. He was (and is) a member of the Royal Astronomical Society, the American Astronomical Society, and the Euro-Asian Astronomical Society, among other professional organizations.

Gaskell’s teaching excellence has been widely recognized. At UNL, he was five times a finalist (one of five finalists out of 1,700 faculty) for the student-awarded “Outstanding Educator” award, and a nine-time recipient of the “Certificate of Recognition for Contributions to Students” from Nebraska’s Parents Association and Teaching Council. Over the years, Gaskell has taught courses for undergraduate and post-graduate students, and has supervised numerous undergraduate, masters and doctoral theses. He has been the recipient of hundreds of thousands of dollars in research grants from NASA and other sources. (Troland Dep., Ex. 2.)

Gaskell has also had extensive involvement in public education and outreach. He has co-produced planetarium shows used in a dozen countries, organized regular public star viewings at UNL, and volunteered at the Hyde Observatory, a public observatory in Lincoln, Nebraska. He has conducted planetarium shows for school children, done extensive radio and TV appearances

on astronomical topics, and conducted telescope-making lectures and demonstrations. (Troland Dep., Ex. 2.)

In his spare time, Gaskell composes, performs and conducts music for the orchestra, organ, chorus, brass ensembles and chamber ensembles. (*See, e.g.*, “Pi Acres Suite for Strings,” by Martin Gaskell, at <http://www.youtube.com/watch?v=8srtVzqgyI8>, last visited September 14, 2010.)

2. Gaskell’s Religion – “Other Than This, He Is Perfect”

In addition to all these accomplishments and credentials, however, his peers knew Gaskell as a “deeply religious man.” (Ferland Dep., 20:15-17.) Gaskell describes himself as “a card-carrying member of the Church of England.” (Gaskell Dep., 68:16-22.) He calls himself a Christian: “If you want a label for me, I would give the label evangelical.” (Gaskell Dep., 70:5-6.) What is more, Gaskell makes no secret of his Christianity, sees no conflict between his religious beliefs and his position as an astrophysicist, and, when asked by colleagues, is more than happy to publicly explore and discuss popular misconceptions about a supposed conflict between science and religion.

In fact, in 1997, UK’s Ferland, invited Gaskell, on behalf of the UK Physics & Astronomy Department, to come to Lexington and give a talk on the topic of science and religion with the purpose of showing that there need not be a conflict between the two. (Ferland Dep., 20:17-19.) Gaskell accepted the invitation and, on November 20, 1997, gave a lecture at UK’s Memorial Hall on the subject of “Modern Astronomy, the Bible, and Creation.”

3. The Memorial Hall Lecture

There is no transcript or recording of Gaskell’s lecture. Ten-year old recollections of its details are understandably sketchy and fairly dim. Among those who recall some details, all are

agreed that, during the question and answer portion of the program, there was an adversarial exchange between Gaskell and a member of the audience regarding something Gaskell said about the theory of evolution. As Gaskell recalls it, near the end of his lecture — a lecture mostly *not* about evolution — he probably said something like “there’s a lot about evolution that is not understood.” (Gaskell Dep., 65:1 to 67:17.)

The audience member who aggressively challenged Gaskell (since identified as UK Associate Professor of Biology, James Krupa) recalls that at the end of a lecture he generally thought “sounded wonderful,” (Krupa Dep., 18:4-6), Gaskell said “either there’s no evidence for evolution or very little evidence for evolution.” (Krupa Dep., 14:2-7.) It is worth noting that, while Gaskell was in the course of answering his questions, Prof. Krupa “tried to stomp out” as Gaskell put it. (Gaskell Dep., 67:2-20.) In fact, Krupa admits that he did not even stay for the entire question and answer session because, as he put it, “I needed to take care of my dogs.” (Krupa Dep., 16:25 to 17:8.) One thing is clear. No one, including Professor Krupa, has a very distinct memory of exactly what Gaskell said to provoke the exchange; but a decade later Krupa would boast to Cavagnero about this episode: “I really ripped into him during question-answer period.” (Troland Dep., Ex. 27.)

4. The Written Lecture Notes

The closest thing to a written record of what Gaskell said that night is his lecture notes. These notes are entitled “Modern Astronomy, the Bible, and Creation,” (hereafter, “MABC”) a version of which appeared on his personal website in 2007 and became a key part of the Search Committee’s debate about his suitability for the observatory job. The notes, while less than a verbatim transcript, generally reflect the substance of his lecture. “It was assumed I was going to say exactly what was in the lecture notes. And I did.” (Gaskell Dep., 58:4-8.)

A fair reading of “Modern Astronomy, the Bible, and Creation,” makes it abundantly clear that Martin Gaskell is *not* a “creationist,” a “scientific creationist,” a “young-earth creationist,” a “fundamentalist,” or any of the other positions that would come to be attributed to him by various participants in the Observatory Director hiring process. In fact, throughout the notes Gaskell is at pains to show “there are more than just two extreme views on the origin of the universe.” (Gaskell Dep., Ex. 4, at 1.) He takes his readers/listeners on a summary of some of the great astronomers and philosophers — Copernicus, Kepler, Galileo, and Newton — who wrote of the essential compatibility of science and theism. He next discusses some ten different interpretations of the book of Genesis, starting with the “Creationist” or “Young-Earth Creationist” position. Gaskell makes it clear he *rejects* this position (Gaskell Dep., Ex. 4, at 5), and later says he thinks attacks by “creationists” on the science of “evolutionists” are “*very bad both scientifically and theologically.*” (Gaskell Dep., Ex. 4, at 4.) He thinks the “scientific” explanations offered by “creationists” are “very poor science” and actually a hindrance to Christianity. (*Id.* at 5.)

On the specific issue of evolution, Gaskell says, “The evidence is very good (and gets stronger every year) that all life on earth descended (i.e., evolved from) from a common origin.” (Gaskell Dep., Ex. 4, at 8.) And while he opines “there are significant problems in evolutionary theory,” particularly regarding the origin of life itself, he states unequivocally “I personally have no theological problem with the idea of God doing things in the ways described in modern theories of evolution (i.e., ‘theistic evolution’).” (Gaskell Dep., Ex. 4, at 9.) He later reiterates, “I believe that evidence for common descent of species is very strong and I have no personal trouble with the theory of evolution.” (*Id.* at 12.)

The balance of “MABC” deals with Gaskell’s attempt to show that modern discoveries and theories about the origins of the universe are not necessarily irreconcilable with the broad outlines of the Genesis story: “[T]he main point that I’d like to get across from doing this is that given there is a possible scientific explanation of most things, one cannot say ‘science disproves Genesis.’” (Gaskell Dep., Ex. 4, at 9.)

The essentially mainstream nature of Gaskell’s remarks on evolution has been conceded *in this litigation* by none other than Professor Krupa, he of the adversarial question and impatient dogs the night of the Memorial Hall Lecture. In his deposition, when asked if, as Gaskell said in 1997, there are problems in evolutionary theory that remain to be solved, Krupa replied: “Yes.” (Krupa Dep. vol. I., 28:4-13.) When asked about Gaskell’s statement that science has no satisfactory explanation of the origin of life yet, and that the question of life is a separate problem from the question of validity of some theories of evolution, Krupa answered: “That is correct.” (Krupa Dep., vol. I, 29:24 – 30:4.)

5. Gaskell’s “Personal Religious Beliefs” Enter the Hiring Process

The first inkling that Gaskell’s beliefs would become problematic in the hiring process is found in an email from Troland to Ferland on September 18, 2007. In noting Gaskell’s superior qualifications, Troland adds a caveat: “But Isaac [Shlosman] is worried about the creationism matter.” (Troland Dep., Ex. 7.) Ferland answered Troland’s caveat: “You know what I know — the night at the public speech and non-evolution.” (Troland Dep., Ex. 8.) This is an obvious reference to the 1997 Memorial Hall lecture. Ferland continues: “If he could keep his mouth shut that would be one thing. If he teamed up with the evolution museum that would be another. *Other than this, he is perfect.*” (*Id.*, emphasis added.)

Ferland's reference to the "evolution museum" apparently refers to the "Creation Museum" a 70,000 square foot museum in Petersburg, Kentucky, devoted to presenting an account of natural and human history according to a literal reading of the Book of Genesis. Inexplicably, many of the participants in the observatory hiring process — Ferland, MacAdam, Shlosman, Krupa, and other UK biologists — fretted about a possible Gaskell connection with the Creation Museum. Cavagnero himself brought it up when he interviewed Gaskell. (At the time, Gaskell had never heard of the place.) (Gaskell Dep., 122:16 to 123:5.) This is in spite of the fact that Gaskell unequivocally *repudiated* the whole premise of the Creation Museum in his lecture notes, calling the approach of Biblical literalists "very bad both scientifically and theologically." (Gaskell Dep., Ex. 4, at 4.)

In any event, in response to the concerns expressed by Shlosman, Professor Cavagnero called and spoke to Gaskell's department chair at UNL. This individual, Roger Kirby, gave Cavagnero a detailed assessment of Gaskell that, at the very worst, can only be described as mixed. He enumerated five separate points in Gaskell's favor, and only two negative points. According to Kirby, Gaskell was (1) a gifted researcher; (2) successful at obtaining research grants; (3) competent and capable at instrumentation; (4) an excellent and engaging teacher; and (5) a very good public spokesperson for the observatory. On the negative side, Gaskell, from time to time sought to "buy out" of some of his "large" teaching load by hiring graduate assistants, (a common practice among University professors apparently) and strongly objected to the department's plans to eliminate graduate research in astronomy. In addition, about a year before this, Kirby had given Gaskell a written Performance Evaluation in which he rated him as "Superior," "Superior plus," and "Good plus" in each of the three categories measured. (Cavagnero Dep., Ex. 6.)

After receiving this standard-type job reference information from Kirby, Cavagnero brought up the subject of Gaskell's religious beliefs: "I also raised the questions of whether *his personal religious beliefs* affected his job performance." (Cavagnero Dep., Ex. 12, emphasis added.) He says that Kirby's answer to his question about Gaskell's "personal religious beliefs" was "largely no." Kirby said he had read all of Gaskell's teaching evaluations and indicated that a small percentage of students would comment that "it was refreshing to meet a scientist who actually believed in God." He added that he had never read a complaint about the manner in which Gaskell discussed "religious issues" with students. (*Id.*) Worth noting in all this is that nowhere in Cavagnero's recounting of his conversation with Kirby is there any mention of the words "evolution" or "creation" or the phrase "position on biological evolution." The discussion was, evidently, strictly couched in terms of "religious beliefs," "God," and "religious issues." (*Id.*)

6. *Sally Shafer Discovers "Gaskell's Websites"*

On September 21, 2007, Search Committee member Sally Shafer wrote to Cavagnero: "I decided to see what was available about Martin Gaskell on the web, in particular about his approach to blending of science and religion." (Shafer Dep., Ex. 4.) Shafer thinks the issue must have come up in a committee meeting prior to this date, hence her investigative efforts. (Shafer Dep., 21:1-7.)

Since it was Gaskell's website(s) (singular and plural) which ended up causing a debate about his suitability, it might be useful to briefly look at what was on them that got the attention of Shafer and others involved in the scout process.

Presumably, the first site linked to in Shafer's email was uncontroversial. It is the official UNL Physics Department's page containing a biographical sketch, information about Gaskell's

teaching, his outreach activities and his research work. (Troland Dep., Ex. 13.) That page does, however, contain a link to something prepared by UNL called a “Professor Profile.” Along with a picture of Gaskell with a telescope, a listing of classes he teaches, information about his favorite foods, movies and hobbies, there is a “favorite quote”: “Draw near to God and He will draw near to you. — James 4:8.” Next, Gaskell answers a series of questions such as “What is your favorite class?” “What is your greatest achievement?”, etc. Among other things, he mentions the fact that he is a Christian, he talks about “God’s universe,”⁸ and says he believes that “from God’s point of view people are important regardless of their socio-economic background, ethnicity, or grade-point average.” (Troland Dep., Ex. 14.)

The Physics Department page also links to another of the sites noted by Shafer, Gaskell’s “Personal Homepage,” clearly labeled *Personal* on both the university page and the “Personal Homepage” itself. On this page, Gaskell has a picture of himself standing in front of some projected ancient musical notations. He identifies himself as an astrophysicist at UNL and links to the university’s “Professor Profile” and the university’s astrophysics home page. He then has links to things like musical compositions, early music performance activities and, what is called on the home page, “Bible and Astronomy Lecture Notes,” which links directly to what we have previously referred to as the notes titled “Modern Astronomy, the Bible, and Creation,” or “MABC.”

⁸ “God’s Universe” is actually the title of a volume of lectures by Owen Gingerich, Professor of Astronomy and of the History of Science at the Harvard-Smithsonian Center for Astrophysics. The lectures delivered at Harvard in 2005 as part of the William Belden Noble Lectures, consist of a “blending of science and religion” similar to that employed by Gaskell in his “MABC.” See, Owen Gingerich, *God’s Universe*, Belknap Press of Harvard University Press, Cambridge, Mass., London, England, 2006. Gingerich, not to mention the trustees of Harvard and the Smithsonian might be surprised to learn that his views would make him “unworthy of a scientific position at UK.” (Hoch Dep., Ex. 1.)

In writing to Cavagnero and Troland on September 21, Shafer includes all of these links but then directs them specifically to the “MABC” link. She has “not yet read it” (she would testify in deposition that she “scanned” it) but says it “promises to be thought provoking.” (Troland Dep., Ex. No. 12.) Shafer allows that Gaskell is “clearly . . . complex and likely fascinating to talk with.” And then comes a caveat: “*but potentially evangelical.*”⁹ (*Id.*)

When deposed, and asked what it was about Gaskell’s websites that led her to think he was “potentially evangelical,” she indicated that the title alone – “Modern Astronomy, the Bible, and Creation” – was enough to tip her off. (Shafer Dep., 24:21 to 25:15.) In response to Shafer’s email, Cavagnero first tells her that he believes in “the freedom of religion,” but he agrees with her that “the committee should be made aware of the issues.” (Cavagnero Dep., Ex. 19.)

And, thus begins “the entire debate generated by his [Gaskell’s] website” that Cavagnero admits was “an element” in the decision at issue in this case.

7. *The Debate Generated by Gaskell’s Website*

At least three of the four members of the Search Committee who voted against Gaskell have admitted that Gaskell’s personal beliefs about evolution — or at least what they supposed those beliefs to be — as well as his “views of religious things” (MacAdam Dep., 17:16-23) and his general approach to “blending” or “mixing” science and religion were discussed among the committee members and were a “factor,” an “element,” or a “theme” underlying the decision making process.

⁹ It turns out that Gaskell freely admits to being *actually* “evangelical,” (Gaskell Dep., 70:5-6) as do, apparently, 28.6% of Americans according to the 2007 Statistical Abstract of the United States.

Professor Keith MacAdam testified that Gaskell's views on "the relationship of astronomy to biblical issues" were discussed in two meetings. (MacAdam Dep., 16:14 to 17:15.) Concerns were voiced about Gaskell's "views of religious things in relation to reconciling what is known scientifically about how the world developed and what is represented in the Bible." (MacAdam Dep., 17:16-23.) MacAdam says he "skimmed" Gaskell's websites and was put off apparently by the fact that the "MABC" notes even talk about religious issues, something MacAdam thinks is inappropriate for a scientist.¹⁰ Finally, MacAdam admits that "this question that was raised by somebody about Gaskell's website," "was a factor" though not the only one, in his decision as to who should get the Observatory Director job. (MacAdam Dep., 20:19-24.)

Steve Ellis, an Academic Coordinator in the Department, couched his discussion of the debate in both religious freedom and free speech terms. In an email to the Committee dated October 8, 2007, Ellis refers to "our basic freedoms, particularly religion and speech" when dealing with Gaskell. In the same email, referring to a medical issue involving another candidate, Ellis says that the committee's discussion of it is "just as sensitive as Martin's freedom of speech and religious beliefs." (Ellis Dep., Ex. 12.) In his deposition, Ellis testified that, while he considered it inappropriate to ask an applicant directly about his religious beliefs, there was committee discussion about whether Gaskell was a "creationist"; further, "religion"

¹⁰ Professor MacAdam is apparently unfamiliar with the whole genre of writings by scientists, some quite prominent, who do precisely what he considers to be inappropriate for scientists to do. See Gingerich, op. cit., *supra.*; also, Francis Collins, *The Language of God, a Scientist Presents Evidence for Belief*, Free Press, New York, 2006; also Kenneth R. Miller, *Finding Darwin's God, a Scientist's Search for Common Ground Between God and Evolution*, Harper Collins, New York, 1999. Collins is a world-renowned physicist-geneticist who headed the Human Genome Project. He was named, in 2009, Director of the National Institute of Health by President Obama. Kenneth Miller is a biology professor at Brown University probably best known for his role in the Intelligent Design case of *Kitzmiller v. Dover Area School Dist.* where he testified against the teaching of Intelligent Design. Miller lectured at the University of Kentucky in 2009 as part of the Bale Boone Symposium. Professor MacAdam had not heard of either Collins or Miller. (MacAdam Dep., 20:4-18.)

was “an underlying theme” in the committee’s discussions of Gaskell’s views. (Ellis Dep., 26:25 to 27:19, and 36:3 to 37:13.)

Sally Shafer, as noted above, was the committee member who first brought Gaskell’s websites to the attention of Cavagnero and Troland. She continued to press the issue she raised with them — that of Gaskell being “potentially evangelical,” and his “blending of science and religion.” On October 4th, she suggested to Troland and Cavagnero that the Committee should get “a Biologist’s take on Martin’s published views — specifically the websites.” (Shafer Dep., Ex. 6.) And later Shafer attempted to answer Ferland’s complaint about what he saw as “McCarthyism” on the part of the committee. Shafer wrote: “If the job were solely about physics and astronomy . . . I would strongly agree with you that Martin’s beliefs on biology and religion don’t matter a hoot and should not figure in the discussion at all.” (Shafer Dep., Ex. 15.) She then proceeded to explain why, in this case, Gaskell’s “views on biology and religion” *did* matter “a hoot” and why his beliefs *did* figure in the discussion. (*Id.*) Later still, Shafer actually volunteered (in response to a *sarcastic* suggestion by Ferland) to check up on how Fayette County public schools determine which churches their teachers attend in order to ferret out potentially religiously problematic (“potentially evangelical”?) employees! (Ferland Dep., Ex. 2.)

The fourth vote against Gaskell was cast by Professor Shlosman, the committee member who attended only the last committee meeting. While in his deposition, Shlosman claimed that Gaskell’s religious views played *no* role in his decision (Shlosman Dep., 25:14 to 26:13), both Troland and Cavagnero attribute to Shlosman the view that Gaskell was *per se* disqualified from even being considered for the job because of his religious views. In the words of Troland: “Isaac . . . was put off by the religion thing.” (Troland Dep., Ex. 14.) And Cavagnero observed: “Isaac,

of course, is one of the people who first raised the alarm about Martin, not out of a lack of respect for Martin's religious freedom, but because of what he saw as the inevitable consequences of what we are now experiencing." (Cavagnero Dep., Ex. 40.) Finally, in his deposition, Shlosman said that, during the process itself, he had reviewed and agreed with the first paragraph of the views expressed by biology professor Jeffrey Osborn in which Osborn, among other things, sounded the alarm about "Gaskell's [sic]" allegedly "very stealthy and clever approach to the issues of creationism and his [sic] clear and obvious connections to deep seeded [sic] religious beliefs." (Shlosman Dep., 23:1-23; Ex. 9.)

The other committee members (or quasi-members in Ferland's case) can also be cited for evidence that Gaskell's religious views were part of the decisional mix in this case. For example, Professor Nancy Levenson, in an email of October 3, 2007, told the committee that she had "absolutely no concerns about Gaskell's astronomical scholarship," (she would later vote *for* Gaskell) and that she was "extremely sensitive to legal and ethical prohibitions against religious discrimination." She wondered how "arguments against hiring him can avoid being discriminatory." (Troland Dep., Ex. 22.)

Ferland's and Troland's views on the matters have already been cited, but it is worth pointing out that Troland — after the process was over and in writing to UK's EEO Office — would state: "I was part of the entire process that led to this decision. I know what observatory committee members said in meetings and privately, not just their email comments." (Troland Dep., Ex. 45.) "Gaskell was judged on his personal beliefs, unrelated to the job he applied for." (*Id.*)

Two non-committee members' (not including the biologists) takes on the religion issue appear in the record and help shed additional light. First, Professor Kovash, who interviewed

both Gaskell and Knauer, appears to have served as a kind of sounding board for Committee Chair Troland during the hiring process. According to Kovash, Troland and he had probably half-a-dozen ten or fifteen minute conversations about the selection process while it was going on. He recalls Troland telling him that Gaskell's personal beliefs about evolution had become a topic at committee meetings. Kovash pointed to an email he received from Troland in which the Search Committee Chair, who presided over every meeting, said that anyone who said Gaskell's personal beliefs were not a factor in the decision was "a liar." (Kovash Dep., 21:20 to 22:4.)

The other non-committee member, one whose views appear to have been quite influential here, was Professor Moshe Elitzur, a member of the Physics & Astronomy Department. Elitzur first appears in the document trail as an unnamed "one of our faculty members who is not on the committee" and who, according to Cavagnero writing to the committee on October 3, 2007, "has expressed some concerns about Martin Gaskell's websites discussing science and religion." (Troland Dep., Ex. 20.) In his deposition, Elitzur testified that as soon as he learned from Professor Shlosman that Gaskell was being considered for the job, he went to Cavagnero and told him that the university should not hire him because "he's a creationist." (Elitzur Dep., 7:16-25.) Elitzur raised the spectre of the Creation Museum and the possibility that the *Lexington Herald-Leader* would run a headline (should Gaskell be hired) that "U.K. hires a creationist for public outreach." (Elitzur Dep., 8:2-8.)

When asked what he meant by "creationist," Elitzur said:

A. He advocates creation science.

Q. And what do you mean by creation science?

A. Creation science is the idea that the earth was not from the - - as part of the Big Bang and all this kind of thing, and that humans were not - - did not evolve on earth, . . .

(Elitzur Dep., 8:16-23.)

Elitzur's basis for believing this was Gaskell's view? "That was known." (*Id.*, 8:24-25.)¹¹

8. *Cavagnero Consults a Higher Authority*

Professor Elitzur's comment to Cavagnero about what the *Lexington Herald-Leader* might do should Gaskell be hired is actually representative of a common theme in the Search Committee's debate about Gaskell. And so, after his conversation with Professor Elitzur, Cavagnero decided to get some advice from higher up, i.e., Dean Steven Hoch and Provost Kumble Subbaswamy (known to all as "Swamy").

On October 1, 2007, Cavagnero wrote to the Dean and Provost. (Cavagnero Dep., Ex. 21.) He began by identifying Gaskell as "something close to a 'creationist.'" (*Id.*) He tells them that Gaskell "accepts evolution" but maintains that "it does not apply to human beings." (*Id.*) Cavagnero then says that Gaskell maintains several websites supporting his view, and provides a link to "MABC." (As previously discussed, there is not the *slightest* basis in "MABC" for this bizarre interpretation of Gaskell's views). Cavagnero then adds that Gaskell is "an accomplished astronomer" who does excellent research and has more experience teaching and doing outreach (thus covering all the advertised job requirements) than the rest of the applicant pool. (*Id.*)

Then comes the real concern. Cavagnero tells the Dean and Provost of Elitzur's concerns. He says Elitzur thinks it is "a huge mistake" to allow the committee "to even consider

¹¹ Of course, Gaskell actually directly and expressly rejects "creation science" as "very bad both scientifically and theologically" in his "MABC."

this candidate.” He conveys Elitzur’s *Herald-Leader* fear and adds that he (Cavagnero) is also worried that “creationists in the state would be eager to latch on to this.”¹² (*Id.*)

Next, Cavagnero says that “up until now” the committee’s discussions have “largely” focused on Gaskell’s obviously superior qualifications and have relegated the “creationist” issue to what Cavagnero calls the “freedom of religion drawer.” (Cavagnero Dep., Ex. 21.) Still, he worries that Elitzur might be on to something and so asks for advice. (*Id.*)

Hoch went to the link provided by Cavagnero, read through the “MABC” for “five or ten minutes” and then dashed off a reply. (Hoch Dep., 43:14-19.) Hoch’s (and Swamy’s) replies to Cavagnero are actually part of an email Cavagnero sent to the committee two days later. (Cavagnero Dep., Ex. 22.)

Hoch tells Cavagnero that, in his opinion, the “MABC” should be considered “a scholarly paper” and that the committee “needs to determine whether this paper and others he might have written are good science.” (Cavagnero Dep., Ex. 22.) Hoch gives an example of the kind of questions the committee needs to ask: “For example, is the ‘young earth creationist position’ he advocates supportable on the basis of the standards of science?” (Of course, in “MABC” Gaskell actually unequivocally *rejects* the “young earth creationist position.”)

Two days after getting the Dean’s and Provost’s advice, Cavagnero passes it on to the committee. (Cavagnero Dep., Ex. 22.) He tells them that “a faculty member” (Elitzur) has expressed concerns about Gaskell’s “websites discussing science and religion.” He talks about

¹²It is, frankly, hard to believe that the “creationists in this state” would “latch on to” the hiring of an Observatory Director whose published writing says, among other things, that creationism “clashes head-on with science,” that creationists’ attacks on evolution are “very bad both scientifically and theologically,” that the “scientific” explanations offered by creationists are “very poor science,” and that the whole creationist approach is a *hindrance* to Christianity. Not to mention the fact that this same individual says he fully accepts and *has no problems with all modern theories of evolution*. (Gaskell Dep., Ex. 4.)

“people in KY” who might use Gaskell’s appointment to advance their “religious agenda, in particular, creationism.” He invokes the spectre of the *Herald-Leader*. He then includes the link to the “MABC,” along with the Dean’s and Provost’s comments which he advises the committee to read carefully. Finally, Cavagnero tells the committee that, in spite of these concerns, Gaskell’s “rights of speech and religious freedom” are of “paramount importance.” (*Id.*)

9. *The Biologists Weigh In*

The day after receiving Cavagnero’s email, Sally Shafer wrote back suggesting that the committee “get a biologist’s take” on Gaskell’s views. (Cavagnero Dep., Ex. 26.) That same day, Cavagnero wrote to Professor Jeffrey L. Osborn of the Biology Department (Shafer works with Osborn on “outreach”) and requested him to look at “MABC” to which he provides the link. (*Id.*) He specifically asks Osborn to assess whether Gaskell “makes scientific statements about evolution that show fundamental lack of appreciation for the scientific method and/or for well established scientific principles.” (*Id.*) Cavagnero is “almost embarrassed to ask” for Osborn’s viewpoint and says he will understand should Osborn not feel comfortable doing this. (*Id.*)

Cavagnero might have spared himself his “almost” embarrassment, for Osborn and two other members of his department jumped to the task with gusto. They seemed to have taken Cavagnero’s request as a call to arms and sprang to the ramparts to defend the rights of Science against The Spectre of Fundamentalism (not to mention the *Herald-Leader*). After some anxious prodding by Sally Shafer on October 15th to hurry up with his report so that it could be given to the committee before its October 16th meeting,¹³ (Shafer already knew the biologists would trash Gaskell), Osborn delivered his “report” and those of two other members of the Biology Department, the day after the meeting, on October 17th. (Cavagnero Dep., Ex. 31.) Cavagnero,

¹³ As previously noted, Troland reported that the October 16th meeting produced no consensus about a leading candidate and no hiring recommendation was made. (Cavagnero Dep., Ex. 32.)

later on October 17th forwarded their comments to the committee under the subject line “the biologists weigh in.” (Cavagnero Dep., Ex. 35.)

Resisting the temptation to skewer the biologists’ efforts at the great and entertaining length they so richly deserve, a few observations must suffice especially since their analysis seems to have carried great weight with among others, Cavagnero, the *de facto* decision maker. Cavagnero told the biologists he was “deeply indebted” to them for their analysis and said that their analysis “will be most helpful” to him in deciding “whether this particular candidate [Gaskell] could be a trusted staff member, able to fulfill the functions of his job without pushing ancillary personal agendas to the detriment of the program.” (Cavagnero Dep., Ex. 33.)

Osborn begins his analysis by saying that he has done “a considerable amount of searching, reading and inquiry in response to the scientific validity of the various aspects of Martin Gaskell [sic] and his website(s).” (Cavagnero Dep., Ex. 35.) Disappointingly, Osborn never reveals what all his searching, reading and inquiry disclosed about the scientific validity of Gaskell himself, and precious little about his websites. He does make the general observation at the outset that “Gaskell [sic] is very stealthy and clever in his approach to the issues of creationism and his [sic] clear and obvious connections to deep seeded [sic] religious beliefs.” (*Id.*) He cites no examples of Gaskell’s stealth or cleverness although, presumably, he does *not* mean Gaskell’s consistent and explicit *rejection* of “creationism” and “scientific creationism” in the document he is analyzing. In fact, Osborn testified in his deposition that in “MABC” Gaskell clearly states he is a creationist (not a very clever way to hide one’s stealth creationism if true); but when asked to point to a specific place in Gaskell’s writing to back up his contention Osborn could only refer to “the title of the article,” “the title says ‘and creation.’” (Osborn Dep., 37:1-25.)

Osborn also saw danger signs in Gaskell's "Professor Profile," the page that appears in his UNL website and was, in fact, prepared by UNL. Specifically, he saw Gaskell's identifying himself in response to a question as "a Christian" who likes to explain things about "God's universe" as an inappropriate "intertwining of religion and science" and evidence that Gaskell does not appreciate the scientific method. "Those two things [religion and science] should stay separate." (Osborn Dep., 56:18 to 57:1.)

So strong was Osborn's objection to Gaskell that, in his report to Cavagnero, he threatened that the Biology Department would refuse to cooperate with Physics and Astronomy on the building of an "outreach science" team were Physics and Astronomy to go ahead and hire one of "these types of individuals." (Cavagnero Dep., Ex. 35.)

As for specific scientific criticism of Gaskell, Osborn could only muster two examples. The first was Gaskell's statement in "MABC" that there are "problems in evolutionary theory." The second was Gaskell's assertion that the so-called "Intelligent Design" movement is not the same thing as "young-earth creationism" and, in fact, does not put forth an opinion on the interpretation of Genesis. (Cavagnero Dep., Ex. 35.) Unfortunately for Osborn, as noted previously, in *his* deposition Osborn's colleague, Professor Krupa, actually conceded that Gaskell was correct about there being "problems in evolutionary theory." (Krupa Dep., 29:24 to 30:4.) As for the Intelligent Design reference, Gaskell simply describes what he understands its tenets to be in the context of canvassing some ten different interpretations of Genesis that have been offered over the years. He no more endorses the concept of "Intelligent Design" in the "MABC" than he endorses any of the others.

Osborn wraps up his four-paragraph scientific analysis of the "scientific validity of Martin Gaskell and his websites" with the warning that hiring Gaskell would pretty much reverse

the Scientific Revolution, at least in Kentucky. (Cavagnero Dep., Ex. 35.) Privately, he and Professor Krupa were thumping their scientific chests with comments like: “We simply cannot let this happen.” (Osborn to Krupa) (Krupa Dep., Vol. 2, Ex. 1.) And Krupa to Osborn: “I’m thrilled you went right to the Provost with this. May piss off those in Physics, but it had to be done! Congrats!” (*Id.*) (Osborn denies going to the Provost about this — perhaps a failure on Krupa’s part to correctly understand what he was hearing.) (Krupa Dep., Vol. 2, 6:1-20.)

Krupa’s own comments to Cavagnero (also passed along to the Search Committee) are more screed than analysis. Gaskell is “an anti-evolution scientist,” hiring him would be a “disaster,” he would “seriously harm science education,” UK might as well hire folks from the creation museum,” etc. (Cavagnero Dep., Ex. 35.) Krupa recounts how he “ripped into” Gaskell back in 1997 and found him to be “a complete embarrassment.” He concludes ominously: “Gaskell concerns me deeply!” (*Id.*)

The third biologist to weigh in, Biology Department Chair Steiner, added an analysis that consists mostly of a block quote he found on an “alternative news nexus” website called “The Raw Story.” The quote is from something called “Religious Might, The Church of Bush,” and basically decries public ignorance of science. In his deposition, Steiner conceded that, based on “MABC,” Gaskell was not a “young earth creationist;” however, he would still label him a “creationist” since he clearly believes that there is “a supernatural origin to the universe.” (Steiner Dep., 48:21 to 49:15.)

As noted above, the biologists’ comments were not sent in time for the Search Committee’s October 16th meeting. By October 17th however, the biologists’ opinions were in the hands of all committee members via Cavagnero’s transmittal email. (Cavagnero Dep., Ex. 35.) But even before receiving Cavagnero’s email, Sally Shafer — she of the concern that

Gaskell was “potentially evangelical” — had been sent her own copy of Osborn’s comments directly from Osborn along with the wish: “I hope that this helps out.” (Shafer Dep., Ex. 13.)

10. *Gaskell Becomes a “Dead Duck”*

The day after the biologists “weighed in” Troland wrote to Ferland that Gaskell has been “blackballed by the biologists” and that Cavagnero “implies that the Dean would never go for the hire, it would create too much friction with biology.” (Troland Dep., Ex. 28.) The next day, October 19th, Troland tells Ferland, “Gaskell almost certainly a dead duck.” (Troland Dep., Ex. 32.)

Later that same day, Troland sent to Cavagnero an email entitled “The Gaskell Affair.” (Troland Dep., Ex. 35.) In this document, quoted several times heretofore, Troland complains that Gaskell is being denied the job “because of his religious beliefs,” that “no objective observer could possibly believe” the decision was based on any reason other than religion, that the whole process causes him to question UK’s commitment to “religious freedom.” He further predicts that “other reasons will be given for this choice when we meet Tuesday.” (*Id.*)

Cavagnero replied to Troland two days later that he did not share his analysis of the situation. He proceeded to present several “other reasons” (as Troland predicted) why Knauer is preferable. In the course of doing so, however, he acknowledged that the religion issue may have played a part in the decisions of at least two committee members (Shafer and Shlosman) and admitted that he himself, as Department Chair, would be “worried” every time Gaskell, as UK observatory director, would be let out in public. (Troland Dep., Ex. 37.)

The tone and substance of this exchange makes it clear that by this point — less than a week after the “no-consensus” committee meeting but mere days after “the biologists weighed in” — Gaskell was indeed “a dead duck.”

11. *Cavagnero Admits the Obvious*

Troland, not satisfied with Cavagnero's analysis, continued the email conversation on October 21st. He suggests that the university's handling of "the Gaskell affair" was faulty "ethically, and, perhaps, legally." (Troland Dep., Ex. 37.) He wonders, "why would we not be vulnerable to the claim that Gaskell was evaluated at least in part on the basis of a criterion (his personal beliefs on biological evolution) unrelated to the published job description, a criterion not applied to any other applicant?" (*Id.*)

In response, Cavagnero writes: "Even if this is, as you suggest, entirely about his position on evolution (*and I think that that is only one element*) I don't see what makes it a case of discrimination?" Cavagnero thus admits that Gaskell's "position on evolution" was at least one element of the decision. (Cavagnero Dep., Ex. 40, emphasis added.)

In his deposition, Cavagnero did not back away from this admission — in fact, he broadened it, no longer limiting it to Gaskell's "position on evolution":

Q. All right. And in this email back to Troland in the second paragraph, you say, "Even if this is, as you suggest, entirely about his position on evolution - - of course we're talking about Gaskell here - - and then you say, "And I think that is only one element. I don't see what makes it a case of discrimination." You see where you say that?

A. Yes .

Q. You would agree, then, that Gaskell's position on evolution was an element in the decision here. Right?

A. By that I was referring to the entire debate generated by the website.

(Cavagnero Dep., 199:18 to 200:5.)

Two days after this exchange between Troland and Cavagnero, the Search Committee voted to recommend Knauer for the job. The committee's report of its deliberations, as well as

Cavagnero's own report to the Dean, makes no mention of "the entire debate generated by [Gaskell's] website." "Other reasons" were given.

12. *EEO "Investigates" the Gaskell Affair*

Within days of learning that the Observatory Director position would be offered to Knauer, Professor Kovash contacted the UK EEO (Equal Employment Office) office with a complaint about the hiring process. Although he harbored no animus toward Knauer and had never met Gaskell before interviewing him during this hiring process, Kovash was concerned that the process had been conducted in a way that was not fair and equitable to Gaskell. As he explained in an email, he was convinced that Gaskell had not been hired because of his "deeply-felt stance on human evolution," something Knauer described as "strictly personal, irrelevant to this particular hiring process, and inextricably entwined with Dr. Gaskell's civil rights and personal freedoms." (Kovash Dep., 13:11-14, Ex. 2.)

Kovash's sources of information included his "weekly" talks with Troland about the search process: ". . . he was relaying to me in our 10, 15 minute meetings what the committee was saying on any particular week, and the fact that it appeared to him that Gaskell's personal beliefs had made a significant impact on how the committee was proceeding." (Kovash Dep., 46:4-10.)

In addition, Kovash had direct personal knowledge that one of the committee members, Sally Shafer, harbored a general anti-religious animus. (Kovash Dep., 20:17-24.)

Kovash's complaint was investigated by EEO's Patty Bender. Her investigation consisted of speaking with Kovash and Troland, on the phone, meeting with Cavagnero and Dean Hoch, and reading some of the emails generated during the process. She took some notes of these conversations. (Bender Dep., Ex. 1.) When she first approached Dean Hoch (without

Cavagnero being present), the Dean appeared to be already familiar with the issue and told her Gaskell was turned down “because of his views on the scientific method — not religion.” Gaskell’s views made him “unworthy of a scientific position at UK.” (Bender Dep., 21:23 to 22:23.) She set up a meeting with Hoch and Cavagnero. Her notes of that meeting reflect some of the “other reasons” predicted by Troland for not hiring Gaskell. Cavagnero said that he had gotten “poor recommendations” from two of Gaskell’s prior Chairs.¹⁴ Hoch says this information was enough for him. He admits he never saw the only available written evaluation by one of Gaskell’s prior Chairs which, upon seeing it as his deposition, he described as “certainly not poor.” Nor does he explain why a new explanation was even needed over and above the definitive “poor scientific method” explanation he had given Bender previously.

Bender interviewed no one else in her investigation — not Shafer, not MacAdam, certainly not Gaskell. And although Bender would tell Kovash on November 5th that no decision had yet been made and that her investigation was ongoing, in fact Knauer had been offered the job several days earlier. Actually, it appears Hoch had instructed Cavagnero to proceed with the offer to Knauer the same day he met with Cavagnero and Bender. (Pica Dep., Exs. 5 and 6.) In vain would Kovash and Troland, over the next several weeks, continue to complain to EEO of “injustice,” “spin control,” of “unconscionable” and morally indefensible actions by people who were now “to put it bluntly, lying.” (Kovash Dep., Ex. 2.) It was “case closed.”

Several months later, having heard nothing from UK about his application, but having been tipped off by Ferland that “the biologists” had cost him the job (Gaskell Dep., 165:2-4)

¹⁴ Something that could only be true if Cavagnero suffered from severe amnesia during his deposition when he related his conversation with *one* of Gaskell’s prior Chairs — far more favorable than otherwise — and denied having had any substantive conversations about Gaskell with anyone other than this one prior Chair. (Cavagnero Dep., 90:18 to 91:4; and 91:24 to 92:4.)

Gaskell would contact, among others, Cavagnero, Troland, and Steiner (the Biology Chair) for some sort of explanation. Hoch told Steiner he couldn't talk to Gaskell. (Steiner Dep., 21:6-19.) Troland expressed his regrets that Gaskell's religious beliefs had indeed been a factor in a decision he disagreed with. (Troland Dep., Ex. 46.)

Cavagnero apologized for not getting back to him sooner, but made no mention of "the entire debate generated by his website."

III. LEGAL ARGUMENT

A. The Summary Judgment Standard

Summary judgment is proper (in this instance, partial summary judgment) "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), and (d)(2). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While all inferences are drawn in the light most favorable to the non-movant, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. UK's Liability Under 42 U.S.C. 2000e-2(m)

This section, added to Title VII as part of the Civil Rights Act of 1991, provides that an employer commits an unlawful employment practice "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). "[T]he purpose and effect of this section was 'to eliminate the employer's ability to escape liability in mixed-motive cases by proving that it would have made the same decision in the absence of the

discriminatory motivation.” *White v. Baxter Healthcare Corp.*, 533 F. 3d 381, 397 (6th Cir. 2008) (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.* 354 F. 3d 277, 284 (4th Cir. 2004) (en banc)). According to the Sixth Circuit, “[I]n mixed-motive cases, a plaintiff can win simply by showing that the defendant’s consideration of a protected characteristic ‘was a motivating factor for any employment practice, *even though other factors also motivated the practice.*’” *White v. Baxter Healthcare Corp.*, 533 F. 3d at 401 (quoting 42 U.S.C. 2000e-2(m) (emphasis in original)).

In this case, the record taken as a whole compels a conclusion that Martin Gaskell’s religion was “a motivating factor” in UK’s decision to bypass him for the Observatory Director’s job, even though “other factors” may also have motivated the decision. The ultimate decision maker, Cavagnero, admitted as much when he testified that “the entire debate generated by his [Gaskell’s] website” was “an element in the decision.” (Cavagnero Dep., 199:18 to 200:5.) Leaving aside (for purposes of the present motion) the statements of witnesses who favored Gaskell’s candidacy (Troland, Kovash, Ferland), the record is replete with evidence from UK’s own agents that “the entire debate generated by his website” was inextricably intertwined with Gaskell’s religion, his religious beliefs, and his willingness to publicly express those beliefs. Since that “debate” was “an element” in the decision — an admission by UK — plaintiff is entitled to judgment under 42 U.S.C. 2000e-2(m). None of the university’s attempts to explain away the obvious here can withstand scrutiny.

1. *The “It’s Not His Religion It’s His ‘Position on Biological Evolution’” Defense*

There is no question that much of the debate about Gaskell had to do with what members of the Search Committee and others supposed to be (erroneously as it turns out) his “creationist” or “scientific creationist” approach to the theory of evolution. In the course of this litigation, UK

appears to be (in the teeth of massive evidence to the contrary) trying to couch this issue in terms of a strictly scientific concern about a strictly scientific question. But the University's own witnesses paint a very different picture.

Those who rejected Gaskell's candidacy had no hesitancy in speaking of his (supposed) views in terms of "religion," "personal religious beliefs," "personal beliefs," and "freedom of religion." For example, in writing to committee members, the Dean, and others involved in the process, Cavagnero used the aforementioned terms no fewer than ten times in describing Gaskell's views and the debate that had arisen over them. Prof. MacAdam, in his deposition, used the phrases "views of religious things," "religious traditions," and "biblical issue" to characterize the Gaskell positions that concerned the committee. Steve Ellis spoke of "religious freedom" and "Martin's religious beliefs" when describing the issue. And Sally Shafer — the committee member who "discovered" Gaskell's websites, worried about him being "potentially evangelical," referred to Gaskell's "religious beliefs" as mattering "a hoot" because he might be let out in public to poison little children's minds all over Kentucky — even volunteered to contact the local public school system to find out how they handled the hiring of *teachers who belonged to certain churches around Lexington*. It may well be that somewhere there breathes a scientist who claims to have deduced that the world was made *ex nihilo* in six days *without* any reference to the Biblical story of Genesis — *Homo Atheisticus-Creationus* perhaps — but for now this individual appears to be little more than a figment of UK's *post hoc* litigation strategic imagination. These people knew they were talking about religion. That's why they used the words they used.

2. The "Entire Debate" Was About More Than Just Evolution vs. Creationism

When given the opportunity at his deposition to say that the debate about Gaskell was only about his “position on evolution,” *Prof. Cavagnero refused to do so.* (Cavagnero Dep., 199:18 to 200:5.) It was Cavagnero himself who broadened the scope of the debate beyond merely Gaskell’s position on evolution. In so doing, of course, he was simply acknowledging what the record demonstrates.

That Gaskell’s views on evolution were just a part of a broader concern about his overall religiousness, his potentially evangelical nature if you will, is demonstrated throughout the debate. For example, when Cavagnero called Gaskell’s former Chair at Nebraska, Roger Kirby, and, by his own admission, raised the issue of Gaskell’s “personal religious beliefs,” he never used the words “evolution,” “creationism,” or the phrase “position on biological evolution.” They spoke of “religious beliefs,” the fact that people remarked that Gaskell “believes in God,” that there had been no problem with how he addressed “religious issues” in class. (Cavagnero Dep., Ex. 12.)

When Prof. MacAdam was given the opportunity to confine his concerns to Gaskell’s views on evolution, he too declined to do so, saying “it’s more than that,” and spoke disdainfully of the very idea of someone who claims to be a scientist (Gaskell) writing about “things as portrayed in the Bible . . . religious traditions.” (MacAdam Dep., 19:6-24.) Similarly, Shafer was concerned not only about “creationism” but also about Gaskell’s overall “blending” of science and religion and what this said about his ability to understand “the process of doing science.” (Shafer Dep., Ex. 15.) Biologist Jeffrey Osborn thought Gaskell’s whole approach was similarly flawed, seemed appalled at Gaskell’s willingness to identify himself as both a scientist and religious believer, and specifically pointed to Gaskell’s “Personal Profile” web page as an example of what made Gaskell so alarming to him and his fellow biologists. The “Personal

Profile” page says absolutely nothing about evolution or creation but does bear a Scripture verse (noted by Osborn) and does contain the phrase “God’s Universe.” (Osborn Dep., 56:18 to 57:1.) Hence, Osborn’s threat about ditching cooperation with Physics & Astronomy in public outreach were they to hire one of “these kinds of individuals.” (At least he didn’t say, “him or his kind.”) (Cavagnero Dep., Ex. 35.)

The defendant’s employees’ own words undermine any argument that the debate about Gaskell was strictly limited to concerns about his scientific position on any issue. It was, rather, very much about one of “these kinds of individuals.”

3. Fear of Public Misunderstanding of Hiring Gaskell Is An Invalid Employment Criterion

The first person to raise the alarm about Gaskell, Prof. Elitzur, did so with an appeal to Cavagnero to think of what the local press would say were UK to hire a “creationist.” Cavagnero, despite initially rejecting this concern because of Gaskell’s “freedom of religion,” seems eventually to have succumbed to this line of argument. There is no question that Search Committee members (both those for and against Gaskell) repeatedly expressed their fears of a public relations blow-up should he be hired. Cavagnero, in his attempt to refute Troland’s “The Gaskell Affair,” finally rests his own eventual anti-Gaskell conclusion on his own fear about what could happen every time Gaskell would “step in front of a TV camera.” (Troland Dep., Ex. 37.)

Aside from the fact that the Gaskell-phobia overshadowing this whole process is utterly without the least factual basis, and the fact that hiring a world renowned astrophysicist who happens to subscribe to all modern theories of evolution, says “creationism” is “poor science” and “very bad,” but who also describes himself as a “Christian” who reveres the Bible (as properly interpreted) would have been the most powerful response imaginable to UK’s “Creation

Museum” fears, the idea that a job applicant may be turned down because of concerns about the bigoted reactions of others has no basis under Title VII or any other law. It cannot be the law that an employer may apply a principle of “some of our best friends are (fill in the blank) but other people might object to us hiring a (fill in the blank).”

Suppose Gaskell had been a Muslim, a Jew, or a woman applying for the job of Observatory Director. Can it possibly be thought that UK could have properly considered it legitimate to have even thought about what might be the reaction of “the Islamophobes, the anti-Semites, the sexists in this state to such a hire” when evaluating the applicant? Would the reaction of the *Herald-Leader* be a relevant concern?

Nor does any perceived “friction” with another department within the University (in this case, Biology) excuse the blatant discrimination that occurred here. The antics of the biologists (comical had they been less damaging to Martin Gaskell and his family) should have been met with a strong correction of their obvious factual baselessness accompanied by an unequivocal affirmation of UK’s commitment to “freedom of religion.” That seems to have been the initial approach of Cavagnero and the committee, before giving way to fear.

4. *Fearing Witches and Burning Women*

The University of Kentucky cannot escape the following facts in this case. In considering the job application of Martin Gaskell, an individual extraordinarily well qualified for the position of Observatory Director, one “element” in the decision was a debate about matters which, in the view of all participants, were inextricably connected with the applicant’s religious beliefs and his expression of those beliefs. The *de facto* decision maker, Cavagnero, admits this. Even giving UK, as the non-movant, the benefit of all inferences from the record, at a bare minimum, the decision was motivated in part by Cavagnero’s fears about Gaskell’s religion.

Fears about what the media might do with the hiring, fears about what the “creationists in this state” might make of it all, and above all, fears about how colleagues within the University would react. And while those fears were either factually without foundation or, even worse in the cases of some of his colleagues, the products of raw bigotry, he allowed those fears to factor into his decision.

In a related context, one court has said: “A phobia of religion . . . no matter how real subjectively will not do. As Justice Brandeis has said, rather starkly, ‘Men feared witches and burnt women.’” *Brown v. Polk County*, 61 F.3d 650, 659 (8th Cir. 1995) (en banc).

IV. CONCLUSION

For the reasons expressed herein, this Court should recognize that no “rational trier of fact,” *Matsushita, supra*, could find anything other than that Martin Gaskell’s religion was “a motivating factor” in the employment decision at issue here. The Court should grant partial summary judgment in favor of Gaskell under 42 U.S.C. 2000e-2(m).

Respectfully submitted this _____ day of September, 2010.

/s/ Francis J. Manion

Francis J. Manion

Geoffrey R. Surtees

American Center for Law & Justice

6375 New Hope Road

New Hope, Kentucky 40052

Tel. 502-549-7020; Fax. 502-549-5252

Edward L. White , III

American Center for Law & Justice

5068 Plymouth Road

Ann Arbor , MI 48105

734-662-2984; Fax: 734-302-1758