

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.)	
)	

**PLAINTIFF’S REPLY TO DEFENDANT’S RESPONSE TO
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

The most remarkable thing about UK’s Response to Plaintiff’s Motion for Partial Summary Judgment is surely this: that the University fails to mention, let alone address, the virtual admission of liability made by its *de facto* decision maker during his deposition. That admission by Prof. Cavagnero — that “the entire debate generated by [Martin Gaskell’s] websites” was “an element” in the decision — was the central argument of plaintiff’s motion. Indeed, plaintiff’s Memorandum in Support quotes or otherwise references Cavagnero’s testimony no less than a dozen times. Yet the University’s Response never mentions it.

Because the present motion is one for partial summary judgment on the issue of liability under 42 U.S.C. § 2000e-2(m), plaintiff need only show that there is no genuine issue of material fact on the question of whether Gaskell’s religion was “a motivating factor” in the challenged hiring decision; not the only factor, nor even necessarily the main factor, only *a* motivating factor. As the Sixth Circuit puts it, under this section of Title VII, “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 381, 401 (6th Cir. 2008) (quoting 42 U.S.C. 2000e-2(m)) (emphasis in original).

In other words, since the defendant admits that the “debate” about Gaskell’s website was “an element” in the decision here, if that debate was essentially one about whether a person of Gaskell’s religious identity was somehow less suitable for the position by virtue of that identity, then the conclusion is inescapable that Gaskell’s religion was “an element”¹ in the decision by UK to bypass Gaskell for the job in spite of his admitted qualifications.

As plaintiff has pointed out, most of the information about the nature and content of “the entire debate” over Gaskell comes from a series of emails generated by the participants in that debate. These emails were written contemporaneously — often within an hour or two — of the events and discussions they chronicle. They were written by people who were there or who, at worst, were getting their information directly from agents of the defendant acting within the scope of their employment and intimately involved in the hiring decision under review. *See* Fed R. Evid. 801 (d)(2)(D). Much of plaintiff’s Memorandum in Support was given over to demonstrating that the emails show that the debate about Gaskell’s suitability was largely about his religion, his personal religious beliefs, his willingness to publicly express those beliefs, and whether or not somebody of his religious identity and, as it were, out front *religiousness* would be suitable as Observatory Director. Much of the University’s Response was given over to denying that the emails had anything to do with Gaskell’s religion.

¹ Plaintiff can perceive of no legal distinction between “an element” — Cavagnero’s term — and a “motivating factor.” Indeed, UK does not challenge plaintiff’s equation of the two. Moreover, Prof. MacAdam, a member of the Search Committee, testified that the question raised about Gaskell’s website “was a *factor*” in the decision. (Doc. 33, MacAdam Dep., 20:19-24).

But now, the University appears at last to have thrown in the towel on this question. In its Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, filed on October 29, 2010, UK admits that "the emails *continually* refer to the issue as a 'religious' issue . . ." Doc. 45, at 3 (emphasis supplied). This has been precisely plaintiff's point throughout. And while the University — in the face of its own admission — continues to want to argue in effect that its agents, all highly educated scientists for the most part, don't know the difference in meaning between phrases like "religious beliefs" and "scientific positions," this Court certainly does know the difference.

UK has admitted that the best evidence about the content of "the entire debate" over Gaskell "continually refer[s] to the issue as a 'religious' issue." *Id.* When this admission is coupled with Cavagnero's admission that the debate was "an element" in the decision against Gaskell, then it would seem that the decision on plaintiff's motion for partial summary judgment becomes a straightforward one. UK has essentially admitted that Gaskell's religion was "a motivating factor" — not necessarily the only factor, but *a* motivating factor in the decision. There is simply no issue of material fact on this question.

II. REPLY TO SPECIFIC POINTS RAISED BY DEFENDANT'S RESPONSE

A. The Attack on Gaskell's Qualifications

That UK chooses to begin its Response with an attack on Martin Gaskell's overall qualifications and competence as a scientist is regrettable.² Gaskell's qualifications for the UK job have been acknowledged at one point or another by every UK employee involved in the process. Even the phrase with which the University apparently wishes to mock the plaintiff — "superbly qualified" — is nothing but a direct quote from UK's own Chair of the Search

² See Plaintiff's Mem. in Support, at 10-12, and referenced exhibits for the details regarding Gaskell's extensive academic and scientific qualifications.

Committee, Prof. Troland. (Doc. 39, Ex. 35.) (Gaskell was “so superbly qualified, so breathtakingly above the other applicants in background and experience.”) The Search Committee itself, when rating the applicants on a scale of 1-10 based on specific qualifications for the Observatory Director job, ranked Gaskell first with a score of “8”. (The successful candidate received a “5”.) (Doc. 39, Ex. 20.) As for Prof. Cavagnero, the *de facto* decision maker in this case, he said that Gaskell “clearly is the most accomplished and experienced of the lot . . .” and “he has been doing the job we want someone to do for many years.” (Cavagnero’s Deposition Ex. No. 10 is attached hereto as Ex. 1.) For the University to now resort to this attack on Gaskell’s qualifications smacks of desperation.

In addition, UK’s insinuation that Gaskell is little more than some sort of bumbling academic vagabond based on the number of job applications he has filed is most unfortunate. In the first place, it is of no legal relevance *to this case* whether or not Gaskell has been turned down by “SIXTY” or SIX THOUSAND prospective employers. Any attempt to use this information as proof of Gaskell’s lack of qualifications for the UK job would be held inadmissible as a matter of course. Fed. R. Evid. 401. Among other things, we know nothing about what the qualifications were for any of those positions, the evaluative criteria used by any of the prospective employers, or the reasons Gaskell was not hired.³ The University proffers no evidence tending to show that, for an academic of Gaskell’s age and experience, sixty job applications is an especially high number, particularly in an economic climate of contracting resources for academic institutions generally.

This is nothing more than a “cheap shot,” in plain English.

³ The University also fails to advise the Court that the document it is quoting does, in fact, indicate that Gaskell was offered a position by the University of Valparaiso. As UK is aware, Gaskell has accepted the position.

The University also distorts the circumstances of Gaskell's separation from the University of Nebraska, suggesting that he was terminated presumably for his general lack of qualifications. (Defendant's Response at 1-2.) But UK is well aware that Gaskell's separation from UNL had *everything* to do with that institution's decision to phase out its graduate astronomy program — Gaskell's particular field of specialization — and nothing to do with any lack of qualifications on Gaskell's part. UK also knows that Gaskell's former Chair at UNL gave him a very favorable written evaluation a year before he applied to UK (Doc. 39, Ex. 6), and spoke highly of Gaskell's job qualifications in a telephone conference call with Cavagnero (Doc. 39, Ex. 12), while, at the same time, explaining certain intra-departmental issues, mostly about the phase-out of the astronomy program, that in no way concerned Gaskell's overall qualifications. *Id.* His contract at UNL came to an end. The school was phasing out its astronomy program, and so Gaskell looked to move on. Any other suggestion unfairly misrepresents the record.⁴

B. UK's Attempt to Redefine "Religion"

The University argues generally that plaintiff is being unfair or inaccurate in drawing certain inferences from the written statements and deposition testimony of its agents. Plaintiff has already catalogued in detail the numerous references in the record to Gaskell's "religious beliefs," "religion," "personal beliefs," "blending of science and religion," and the like that were made by UK employers involved in the job selection process. (*See* Plaintiff's Mem. in Support at 12-34; and Plaintiff's Mem. in Opposition to Defendant's Summary Judgment Motion at 5-

⁴ UK also wonders why Gaskell has not brought a religious discrimination claim against any of the other institutions to which he applied. Could it be that UK is the only one where employees of the institution *told him* he had been discriminated against based on his religious beliefs? (Doc. 21, Gaskell Dep., 165:2-4.)

22.) More important, UK has now *admitted* that the emails written by the participants in this decision making process “continually refer to the issue as a ‘religious’ issue.”

It is certainly understandable that UK would prefer that those statements had not been made and those terms not been used, but that is something UK’s agents did. What is more, UK never really offers a plausible explanation for why this Court should believe that every time these intelligent, highly educated people use words like “religion,” “religious beliefs,” “religious freedom,” “evangelical” and the like, they actually mean something completely different than what most people would think they mean. Indeed, there is no plausible explanation. And, as the following examples will show, every attempt the University makes to dig itself out of its hole only seems to dig it in deeper.

1. *Potentially Evangelical*

Committee member Sally Shafer wrote an email in which she says that, having discussed Gaskell’s websites, she finds him “complex” and “fascinating,” “but potentially evangelical.” (Doc. 40, Ex. 4.) In common English usage, the adjectives that come before “but” in this sentence are positive; the “but” connotes that what follows is negative or at least implies some reservation, some qualification. In other words, “potentially evangelical” is a strike against Gaskell, something to be concerned about.

The University says this does not suggest discrimination or anti-religious animus because “he [Gaskell] calls himself evangelical.” This is like saying that a prospective employer who notes that an applicant is “complex and fascinating, but potentially Jewish” or “potentially Catholic” or “potentially Muslim” is on solid ground as long as the applicant himself publicly admits or displays some evidence of his Jewishness, Catholicism or Islamic faith. Yet, being a member of a particular religious group can *never* be a *but* in a hiring process. That is the very

essence of what Title VII was enacted to prevent. The University of Kentucky's extraordinary defense of Shafer's extraordinary statement is troubling to say the least.

Does UK really think it would *not* be discriminatory if, in reviewing a set of job applications, one of its employees commented that "Applicant is complex and fascinating, *but* potentially African-American, or potentially Asian, or potentially a woman"? The U.S. Census Bureau, which publishes the Statistical Abstract of the United States, lists "Evangelical" as one of thirty separate denominations of Christians in the United States.⁵ Placing the word "but" before "evangelical" or any other religious denomination is no less discriminatory than would be placing the word "but" before a description of an applicant's race, national origin or gender.

2. *Sally Shafer's Research Project*

The University of Kentucky bristles at plaintiff's directing the Court's attention to the fact that Shafer volunteered to investigate what Kentucky public schools do about taking an applicant's religious beliefs into account when hiring teachers, especially applicants who belong to certain churches. But this is exactly what Shafer did. The documents UK refers to demonstrate this. (Doc. 22, Ex. 2.) Ferland asks the sarcastic question (and *contra* UK, Ferland is certainly *not* "uninformed" about the contents of his own emails) and, instead of recognizing that Ferland is making a sarcastic suggestion along the lines of checking into applicant's racial background, Shafer actually volunteers to do a thorough investigation of the matter — not just Fayette County, she suggests combing the whole state! (Doc. 44, Ex. 38.) What do other state institutions do about the problem of people who attend certain churches wanting to work in public schools? Incredible. But plaintiff didn't create this record, the defendant did.

⁵ See U.S. Census Bureau, *The 2010 Statistical and Abstract Table 75*, at www.census.gov/compendia/statab/cats/population/religion.html, last visited October 27, 2010.

3. *Shafer's Religious Bias*

Because of its somewhat personal nature, plaintiff declined to fully describe the source of Prof. Kovash's personal knowledge that Shafer came to this process with a general anti-religious bias. (*See* Plaintiff's Mem. in Support at 32.) But UK has seen fit to reveal it. (Defendant's Mem. in Response at 11.) Kovash was married to Shafer for over twenty years, and has first hand knowledge that "she has no place for religion in her life." (Doc. 23, Kovash Dep., 20:17-25, 48:19-49:5.) The University of Kentucky calls this "an apparent bias," although it is hard to imagine a better first hand source of actual knowledge of someone's beliefs than twenty-plus years of marriage.

4. *Plaintiff's Treatment of the Biologists*

The University complains that, in discussing the contributions of the biologists, plaintiff's Memorandum "drips with sarcasm and innuendo" and argues a point that is "completely delusional." (Defendant's Mem. in Opposition at 7-8). But when one considers the record evidence that the biologists, knowing what use would be made of their opinions — a man's job was on the line — were either unable or unwilling to accurately read and communicate to others Gaskell's actual views and, instead, fell back on a kind of knee-jerk Fundamentalism-phobia and questionable recollection of a ten-year old lecture, then sarcasm and innuendo were the least they deserved.

The significance of the biologists' contribution to this search process cannot be overstated. As noted, the day before the biologists "weighed in" the Search Committee had not reached a consensus on a candidate and took no vote. (Doc. 39, Ex. 32.) But less than a week after reviewing the biologists' views, the Committee voted against Gaskell. (Doc. 38, Ex. 40.) Most important of all for purposes of this motion, it seems clear that, for Cavagnero, the

biologists' opinions and attitudes were something of a game-changer. (Doc. 39, Cavagnero Dep., 196:25–197:11; *see also*, Doc. 37, Ex. 28, “Mike C. [Cavagnero] implies that the Dean would never go for the hire. It would create too much friction with biology.”)

The fact that the biologists' opinions were based on so fundamentally flawed a reading of Gaskell's published views can only be explained if one concludes that they were operating from a deep-seated bias against anyone exhibiting the sort of religious identity seen in a Martin Gaskell. The biologists are obviously intelligent and highly educated people. Yet, as plaintiff has already shown, time after time during this process, they simply ignored Gaskell's clear and repeated expressions of acceptance of all modern theories of biological evolution and reached conclusions that simply cannot have been other than the products of bias or prejudice. (Plaintiff's Mem. in Support at 14–15, and Plaintiff's Mem. in Opp. at 4.)

Significantly, the opinions of the biologists were *not* limited to concerns about Gaskell's views on evolution. Jeffrey Osborn, the primary contributor to the process made clear that his concerns included an overall objection to Gaskell's so-called “blending” of science and religion, not only in the MABC but in other parts of Gaskell's website, parts having nothing whatsoever to do with evolution. Gaskell is open about his religious faith. “Real” scientists are not open about their faith. Therefore Gaskell is suspect as a scientist and his views on evolution must be suspect as well (even though nothing in the article under review actually says so).

That the biologists' views were *not* based on evidence, but supposition and prejudice, ought to have been obvious to those members of the Committee — and Prof. Cavagnero — who considered them in reaching their decisions. It did not take a biologist to be able to read the multiple sentences in Gaskell's “MABC” that leave no doubt that he accepts evolution of all life

on earth, that he rejects “scientific creationism,” and that he actually considers the latter “very bad” from both a scientific and religious standpoint.

That being said, it is, frankly, mind boggling that, in its Response, UK adopts and continues to argue the bias-engendered misreading of Gaskell’s views that undermined his candidacy. For example, UK says, “Clearly, Gaskell cannot accept differing viewpoints from his on evolution . . .” (Response at 8.) *But Gaskell’s viewpoint on evolution is the same viewpoint as that of the UK biologists.* Or, “Gaskell can distance himself as much as he wants from his published lecture notes . . .” (Response at 5.) But Gaskell has no desire to distance himself at all from his published lecture notes. He only wishes the people at UK would *actually read them* instead of prejudging them (and him) because he happens to talk about the concept of “Creation.”⁶ Or, “By mixing the terms ‘atheism’ and ‘humanistic evolution’ Gaskell clearly blended science and religion. . . .” (Response at 14.) But UK (as did the biologists) fails to note that Gaskell also uses the terms “*theistic evolution*,” a position that appears closest to his own.⁷

Finally, there’s this: “The scientific community does not accept ‘intelligent design’ as science,” followed by a discussion of the case of *Kitzmiller v. Dover School Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (Response at 5.) *But neither does Gaskell accept “intelligent design” as science!* To the extent that this concept is mentioned at all in his MABC, it is in the context of Gaskell’s survey of various contrasting views of the interpretation of Genesis. Gaskell makes clear that “intelligent design” is a philosophical, not scientific, enterprise. (Doc. 21, Ex. 4.)

⁶ Both biologist Osborn and committee member Shafer were put on their guard by the *title alone* of the MABC because it includes the word “Creation.” (Doc. 31, Osborn Dep., 37:1–25; Doc. 40, Shafer Dep., 25:10–15.)

⁷ Biologists Steiner and Krupa both took umbrage at the phrase “humanistic evolution” and both failed to note Gaskell’s use of the phrase “theistic evolution,” which describes the view of those, like Gaskell, who see no theological or scientific difficulty in accepting both the idea of a Creator and all modern theories of biological evolution.

And there is certainly nothing “delusional” about noticing the “gusto” with which the biologists undertook their task in this case. In fact, it was first noted by Prof. Cavagnero himself, who expressed surprise at the “vehemence” of the biologists’ “very strenuous” reaction to Gaskell’s candidacy. (Doc. 39, Cavagnero Dep., 179:12-18.) Search Committee Chair Troland remarked that one of the biologists (Krupa) reminded him of a “Chuck Norris wanna-be” because of the obvious zeal with which he took up the cudgels against Gaskell. (Troland Deposition Ex. No. 30 is attached hereto as Ex. 2.) Plaintiff has documented the biologists’ somewhat less than dispassionate, objective review of Gaskell’s work at Mem. in Support at 28–29 (“We simply cannot let this happen;” “Had to be done! Congrats!”). Plaintiff never suggested that the biologists were “lying in wait” to hurt Gaskell, only that, when once summoned, they threw all scientific objectivity to the winds and let their prejudices cloud their efforts. The record proves this is exactly what happened.

5. *What Cat? What Bag?*

In its Reply to Plaintiff’s Response to UK’s Summary Judgment Motion, Doc. 45, at 3, the University blames Gaskell for the fact that his religious views were taken into consideration in this hiring process, saying that “Gaskell let the cat out of the bag.” And while the University never once, in any of its filings in this case, quotes whatever “publicly-made comments” Gaskell is supposed to have made about evolution that rendered his religious beliefs fair game in the hiring process, the use of this phrase about the cat and the bag is most telling. For while no one at the University has anything remotely approaching a clear recollection of whatever Gaskell said thirteen years ago in the course of a talk at Memorial Hall (Plaintiff’s Mem. in Support at 12–13); and while his written comments on the topic do not deviate at all from the view of evolution held by the UK biologists themselves, the underlying theme of the biologists as well as

several members of the Search Committee seems to be that, because Gaskell is an openly religious person — admittedly, *not* “potentially” evangelical — he must be hiding something. Osborn thought Gaskell’s writing in which he repeatedly acknowledges the validity of evolutionary theory and actually “bashes” — not evolution, but scientific creationism — was somehow “stealthy and “clever” and showed “clear and obvious connections to deep seeded [sic] religious beliefs.” (Plaintiff’s Mem. in Support at 27.)

A majority of the committee, along with Prof. Cavagnero, apparently bought into this complete *non sequitur*. UK cannot plausibly deny that, at a minimum, Cavagnero’s fear about what people inside and outside the University would think should UK hire a person like Gaskell was a motivating factor in the ultimate decision. But fear that co-workers or the public would react negatively to the hiring of an African-American professor, or a Muslim, or a woman, or someone who is “potentially” or actually evangelical can *never* be a lawful basis for an employment decision under Title VII.

The University of Kentucky, understandably, wishes it could rewrite the record that its agents created in this case. That record, with its damaging admissions that Gaskell’s personal religious beliefs and identity were held against him by those involved in the hiring process, is the real “cat let out of the bag” in this case. Gaskell had a good basis for believing his religion was a factor here even before receiving the documents provided by UK in discovery. Those documents, the ones that “continually refer to the issue as a ‘religious’ issue,” confirmed in spades what Gaskell already believed to be true.

III. CONCLUSION

The record in this case demonstrates that there is no genuine issue of material fact on the issue of whether or not Gaskell's religion was *a* motivating factor in the employment decision under review. This Court should grant Plaintiff's Motion for Partial Summary Judgment on the issue of UK's liability under 42 U.S.C. § 2000e-2(m).

Respectfully submitted this 1st day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, I electronically filed the foregoing Notice of Filing Plaintiff's Memorandum in Support of Partial Summary Judgment with the Clerk of Court using the CM/ECF filing system, which will send notification of such filing to the following:

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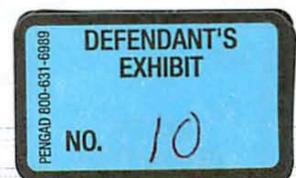
From: Mike Cavagnero [mike@pa.uky.edu]
nt: Thursday, September 20, 2007 4:47 PM
o: Tom Troland
Subject: Interview with Martin Gaskell

Martin Gaskell's phone interview was quite unlike the others; he clearly is the most accomplished and experienced of the lot, at least in my mind. He could have talked expansively for an hour or more about each of the questions posted in the interview.

I asked him several follow-up questions on Outreach at Sally's request; his responses were very pragmatic, he seemed to know what actually produces something meaningful and what doesn't. For example, his experience with teachers was that they were easily wowed, but that it was extremely difficult to give them something astronomy-related that they could really bring back to their classrooms. He cited examples, such as teachers who had gone through considerable trouble to purchase telescopes, only to be told that students were not allowed to gather in the dark!

In short, I think he has been doing the job we want someone to do for many years. The questions of his suitability are of a different nature ... the cost is likely to be high ... he is pretty set in his ways ... he has a larger bent on research (with undergraduates) than most of the other candidates ... he may not easily take direction from the faculty, etc.

Mike



Gary J. Ferland

From: Thomas H. Troland [troland@pa.uky.edu]
Sent: Thursday, October 18, 2007 6:52 PM
To: gary@pa.uky.edu
Subject: RE:

Gary,

Thanks for your insights. I have spoken to the Colonel about this matter, she even downloaded and read through part of his tract on religion and science. But I will bring up the issue again to her in light of the biologists' response. I do understand their sensitivity to the evolution issue. But we are not looking for someone to teach evolution. I find the biologists' responses to be a bit on the emotional side. One claimed he "ripped in" to Gaskell when Gaskell was here a few years ago. A Chuck Norris wanna-be, I assume.

And you are right that Gaskell would be a real leader. Even when he was here, he insisted upon going up to the observatory the night of his interview (despite bad weather) to work with the telescope, look through it at a terrestrial object, etc. In so doing, he identified a number of issues we may have to deal with, for example, the telescope cannot see below 25 degrees, he suggested an extension to the pier. And he suggested elevating the dome floor and a way to deal with disability access.

And, yes, we do need a leader. As you say, no one on the current faculty has the time or the expertise to develop the observatory. Martin would have both. And if he took some time to publish papers, what is the down side of that? As Mike pointed out, Martin would most probably work with undergraduates. He would probably have difficulty attracting graduate students since they would more likely be drawn to regular faculty. But undergraduate research is something this department has long sought to foster.

I really think that we are fortunate to be in a position to get Gaskell. His flaws, as you say, are the only reason he is available to us. I am willing to take the chance on those flaws, especially since he generated no controversy at Nebraska.

But I'll bet it won't happen. Tim's a nice guy but he has no experience working with observatories. And the other guy seems nice enough and is working at a comparable observatory. But he seems a bit on the sky side, and he is probably not a real leader.

I'm about to go home, consult with the Colonel, and have some happy sauce.

Tom

At 04:55 PM 10/18/2007, you wrote:

> > some of the right wing in me. Am I getting old? If we were
> > proposing to
> > hire Gaskell to do biology public outreach, the situation
>
> have you sought advice from The Colonel? I talked to Ann about this on
> the way up, and she was the one who brought up Rush Limbaugh.
>
> Alan Sandage has kept his mouth shut about this, and apparently Gaskell
> did too while at Nebraska. this issue is a flaw with Gaskell, but if
> he did not have a serious flaw a person with this background would not
> be available to us for this job.



>

>if it hinges on this issue, then a grave injustice is being done. I
>think we agree on this. There is the analogy to Jews in Germany in
>1930's - the Christian churches who stood by as things got worse and
>worse were, in the end, almost as guilty as the national socialists.
>this is a form of Nazi behavior, as Rush Limbaugh would be the first to point out.

>

>the other problem is the mindset within the dept, which is to give
>minimum worth to the 100 level courses. if we were a healthy
>department and knew of the importance of these courses, there would be
>no end of good people who want to step up and make the observatory
>successful. in the end it will be you, me, Keith, and Mike C. A weak
>director, like the second two in the current round, will be a follower of this core of
highly distracted faculty.

>Gaskell would be a person who would step up, into a leadership position
>with a vision, who would make it happen.

>

>Gary