

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION  
CIVIL ACTION CASE NO. 5:09-cv-00244-KSF

*filed electronically*

C. MARTIN GASKELL

PLAINTIFF

V.

**DEFENDANT'S WITNESS LIST, EXHIBIT LIST,  
AND PRE-TRIAL MEMORANDUM**

UNIVERSITY OF KENTUCKY

DEFENDANT

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Comes the Defendant, University of Kentucky, by counsel, and for its Witness List, Exhibit List, and Pre-Trial Memorandum, states as follows:

**(i) WITNESS LIST:**

1. Michael Cavagnero, Chairman, University of Kentucky, Department of Physics & Astronomy, 177 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. Cavagnero is Chairman of the Department of Physics & Astronomy at UK and will testify regarding the search process for the selection of Director of UK's student observatory and the basis for his recommendation for the position of Observatory Director. He will also testify about the environment in UK's Physics and Astronomy Department during the time of the search for the Director of the Observatory.

2. Thomas H. Troland, University of Kentucky, Department of Physics & Astronomy, 283 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. Thomas Troland served as the Chair of the Advisory Committee which made recommendations regarding the candidates for the Director for the MacAdam Observatory on UK's Lexington Campus. He will testify regarding the search process and the criteria discussed by the advisory committee members in selecting an observatory director.

3. Nancy A. Levenson, University of Kentucky, Department of Physics & Astronomy, 275 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. Levenson served on the Advisory Committee for the selection of the Director of the McAdam Observatory on the University of Kentucky Lexington Campus. She is currently working in Chile but may be called to testify regarding the search process for observatory director.

4. Keith MacAdam, University of Kentucky, Department of Physics & Astronomy, Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. MacAdam served on the Advisory Committee that made recommendations regarding the candidates for the Director of the MacAdam Observatory. He will be called to testify regarding the search process and the criteria he considered for his recommendations for the Director and what criteria was discussed by the Advisory Committee members during the search process.

5. Isaac Shlosman, University of Kentucky, Department of Physics & Astronomy, 289 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. Shlosman served as a member of the Advisory Committee that made recommendations regarding the candidates for the Director of the McAdam Observatory. He will be called to testify regarding the search process, the criteria he considered, and the criteria discussed by the Advisory Committee members during the search process.

6. Sally Anne Shafer, Lexington, Kentucky. Sally Shafer was a staff member in the Physics & Astronomy Department at UK and served as a member of the Advisory Committee which made recommendations regarding the candidates for the Director of the MacAdam Observatory. She will be called to testify regarding the search process, the criteria she considered, and the criteria discussed by the Advisory Committee members during the search process.

7. Kumble R. Subbaswamy, Provost, University of Kentucky, 105 Main Building, Lexington, Kentucky 40506-0032. Provost Subbaswamy will be called to testify about issues

which arose during the search process for Observatory Director regarding how the committee should consider public information disseminated by Martin Gaskell about his thoughts on biological evolution. Provost Subbaswamy previously worked in the Department for Physics and Astronomy at UK and will testify regarding some of the relationships between the faculty in that department.

8. Gary J. Ferland, University of Kentucky, Department of Physics & Astronomy, 291 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Dr. Ferland is a professor in the Department of Physics & Astronomy at the University of Kentucky. Ferland was out of the country during the search process but corresponded with members of the Advisory Committee during the process, and he may be called to testify regarding comments made in that correspondence. Dr. Ferland will also testify that he invited Martin Gaskell to give a lecture at UK in 1997 regarding “Modern Astronomy, the Bible and Creation” and will testify about comments made by Gaskell during that lecture. Ferland will also testify regarding his communications with Gaskell during and after the search process.

9. Steven L. Ellis, Academic Coordinator Senior, University of Kentucky, Department of Physics & Astronomy, 68 Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Steve Ellis is a staff member in the Department of Physics & Astronomy at UK and served as a member of the Advisory Committee that made recommendations regarding the candidates for the Director of the McAdam Observatory. He will be called to testify regarding the search process, the criteria he considered, and the criteria discussed by the Advisory Committee members during the search process.

10. Moshe Elitzur, Professor, University of Kentucky, Physics & Astronomy Department, Chemistry and Physics Building, Lexington, Ky. Dr. Elitzur will be called to testify that he was aware of comments Martin Gaskell made during a lecture on the UK Campus in

1997 critical of the theory of biological evolution and that he discussed Gaskell's lecture comments with Prof. Mike Cavagnero during the search process.

11. Timothy Gene Knauer, Director, MacAdam Observatory, University of Kentucky, Physics & Astronomy Department, Chemistry-Physics Building, Lexington, Kentucky 40506-0055. Timothy Knauer was selected as the Director for the MacAdam Observatory. He may be called to testify about his interviews for Observatory Director and what information he provided to individual Committee members relative to the mission of the Observatory during the search process.

12. Jeffrey Osborn, Professor, University of Kentucky, Department of Biology & Science Outreach, 101 Morgan Biological Science Building, Lexington, Kentucky 40506-0225. Dr. Osborn reviewed Gaskell's lecture notes and web sites at the request of Mike Cavagnero and commented on the scientific integrity of some of Gaskell's statements regarding biological evolution. Dr. Osborn will be called to testify regarding the scientific validity of Gaskell's comments on evolution.

13. Sheldon Steiner, Chair, University of Kentucky, Department of Biology & Science, 101 Morgan Biological Science Building, Lexington, Kentucky 40506-0225 Dr. Steiner reviewed Gaskell's lecture notes and web sites at the request of Mike Cavagnero and commented on the scientific integrity of some of Gaskell's statements regarding biological evolution. Dr. Steiner will be called to testify regarding the scientific validity of Gaskell's comments on evolution.

14. James Krupa, Professor, University of Kentucky, Department of Biology & Science, 101 Morgan Biological Building, Lexington, Kentucky 40506-0225. Dr. Krupa attended a lecture in 1997 which was given by Martin Gaskell and will be called to testify about Gaskell's comments on evolution during that lecture. He later was asked to review Gaskell's

lecture notes at the request of his colleague Jeff Osborn and will testify about the scientific integrity of Gaskell's statements about evolution.

15. Steven L. Hoch, former Dean of the College of Arts & Sciences, University of Kentucky. Dr. Hoch was the Dean of the College of Arts and Sciences at UK and selected Timothy Knauer for the Director of the MacAdam Observatory at the University of Kentucky Lexington Campus based on the recommendation of an advisory committee. Dr. Hoch has given a video deposition in this case and that deposition will be introduced into evidence by Defendant.

14. C. Martin Gaskell, University of Texas, Austin, Texas. Dr. Gaskell is the Plaintiff in this action and will be called to testify about the questions he was asked during the search process for Observatory Director. He will be called to testify regarding his former employment, his job search as well as his current employment.

15. Patty Bender, University of Kentucky, Office of Institutional Equity and Equal Employment Opportunity. Ms. Bender conducted an investigation into allegations of religious discrimination against Gaskell by Michael Kovash and will be called to testify regarding that investigation and the conclusion she reached in that investigation.

16. Archisman Ghosh, graduate student, University of Kentucky. Mr. Ghosh was a graduate student in the Department of Physics and Astronomy in 2007 and will be called to testify about interviews he attended with three candidates for the Observatory Director position and his recommendation based on those interviews.

17. Kristin Thompson, graduate student, University of Kentucky. Ms. Thompson was a graduate student in the Department of Physics and Astronomy in 2007 and will be called to testify about interviews she attended with three candidates for the Observatory Director job and her recommendation based on those interviews.

18. Syed Uddin, graduate student, University of Kentucky. Mr. Uddin was a graduate student in the Department of Physics and Astronomy in 2007 and will be called to testify about

interviews he attended with three candidates for the Observatory Director job and his recommendation based on those interviews.

19. Carol Cottrill, Business Officer, Physics and Astronomy Department, UK. Ms. Cottrill will be called to testify that she met with Dr. Gaskell and two other candidates for the Observatory Director position when they came to the UK campus for interviews. She will testify regarding her impressions of the candidates and what she communicated about her impressions to Professor Mike Cavagnero.

20. John Pica, Former Assistant Dean of Finance and Administration at the University of Kentucky College of Arts and Sciences. Mr. Pica will be called to testify regarding interviews he conducted with three candidates for the Observatory Director position and his impressions of the candidates based on those interviews.

21. Roger Kirby, Ph.D., Department Chair, Department of Physics and Astronomy, University of Nebraska at Lincoln. Dr. Kirby may be called to testify regarding information he provided to Mike Cavagnero about Martin Gaskell's job performance while his was employed at UNL.

20. This Defendant reserves the right to call at trial any and all witnesses identified by the Plaintiff.

**(ii) EXHIBITS:**

1. UK HR Policy 10.0, Staff Employment.
2. UK HR Policy 2.0, Equal Opportunity, Discrimination, and Harrassment.
3. Job posting for Director, MacAdam Observatory, University of Kentucky Lexington Campus.
4. Job posting from UKHR re "Observatory Manager."
5. CV/Resume of C. Martin Gaskell submitted to the University of Kentucky for the position of Director of the MacAdam Observatory..

6. CV/Resume of Timothy Gene Knauer submitted to the University of Kentucky for the position of Director of the MacAdam Observatory.

7. CV/Resume of Quinn Sykes submitted to UK for the position of Director of the MacAdam Observatory.

8. Correspondence between Gaskell and Cavagnero, November 7, 2005 re possible position at UK.

9. Email communication between Cavagnero and Gaskell dated August 20, 2007 re Observatory Directorship question.

10. Email correspondence between Gaskell and Cavagnero dated August 21, 2007 re references.

11. Email correspondence between Shafer, Cavagnero and Troland dated August 21, 2007 re Observatory Director position.

12. Email correspondence between Shafer and Cavagnero dated August 22, 2007 re conversations with candidates.

13. Email correspondence between Troland and advisory committee members dated August 30, 2007 re director search.

14. Email correspondence between Shafer and advisory committee members dated August 31, 2007 re director search.

15. Email correspondence between Troland and advisory committee members dated September 5, 2007 re Observatory Director telephone interviews.

16. Email correspondence between Troland and advisory committee members dated September 5, 2007 re Observatory Director telephone interviews.

17. Email correspondence between Levinson and advisory committee members dated September 5, 2007 re Observatory Director telephone interviews.

18. Email correspondence between Shafer and advisory committee members dated September 6, 2007 re Observatory Director telephone interviews.

19. Email correspondence between Lewis Bosworth and Cavagnero dated September 10, 2007 re disposition of candidates for Observatory Director.

20. Email correspondence between Cavagnero and advisory committee members dated September 14, 2007 re Martin Gaskell. EML

21. Email correspondence between Shafer and Cavagnero dated September 14, 2007 re FWD: Martin Gaskell.

22. Email correspondence between Diane Yates and Mike Cavagnero dated September 17, 2007 re Gaskell.

23. Email correspondence between Shafer and Cavagnero dated September 17, 2007 re Gaskell interview.

24. Email correspondence between Keith MacAdam and Mike Cavagnero dated September 17, 2007 re Gaskell interview.

25. Email correspondence between Cavagnero and Shafer dated September 18, 2007 re Gaskell interview.

26. Email correspondence between Cavagnero and Troland dated September 19, 2007 re Martin Gaskell.

27. Email correspondence between Cavagnero and Tom Troland dated September 20, 2007 re interview with Martin Gaskell.

28. Email correspondence between Sally Shafer, Troland and Cavagnero dated September 21, 2007 re Gaskell web information.

29. Email correspondence between Cavagnero and Shafer dated September 21, 2007 re Gaskell web information.



30. Email correspondence between Troland and advisory committee members dated September 24, 2007 re further deliberations re director position.

31. Email correspondence between Keith MacAdam and advisory committee members dated September 28, 2007 re Observatory Director matters.

32. Email correspondence between Steve Ellison and advisory committee dated September 28, 2007 re Observatory Director matters.

33. Email correspondence between Troland and advisory committee members dated September 29, 2007 re Observatory Director interviews.

34. Email correspondence between Troland and Eugenie Scott dated October 21, 2007 re "Have you heard of Martin Gaskell?"

35. Email correspondence between Troland and Ferlan dated October 25, 2007 re "your broken course."

36. Email correspondence between Shlosman and Advisory Committee members dated October 29, 2007 re Observatory Director interviews.

37. Email correspondence from John Pica to Cavagnero dated October 2, 2007 re "Observatory Director interviews."

38. Email correspondence between Syed Uddin and advisory committee members dated Oct. 2, 2007 re "Director interviews."

39. Email correspondence between Keith MacAdam and Advisory Committee members dated Oct. 2, 2007 re Director interviews/schedules.

40. Email correspondence between Cavagnero and Ferlan dated October 3, 2007 re "something to think about."

41. Email correspondence between Cavagnero, Shafer and Troland dated October 4, 2007 re "biologists view"

42. Email correspondence between Cavagnero and Jeffrey Osborn dated October 4, 2007 re “two items.”

43. Email correspondence between Kovash, Troland and Cavagnero dated October 15, 2007 re “observations on the director.”

44. Email correspondence between Troland and advisory committee members dated October 15, 2007 re “observations on the director.”

45. Email correspondence between Ellis and advisory committee members dated October 16, 2007 re “observations on the director.”

46. Email correspondence between Cavagnero, Osborn and Krupa dated October 27, 2007 re “two items.”

47. Email correspondence between Cavagnero and Krupa dated October 17, 2007 re “two items.”

48. Email correspondence between Ferlan and Advisory Committee members dated October 19, 2007 re “thoughts on Gaskell’s biology.”

49. Email correspondence between Cavagnero and Troland dated October 19, 2007 re “the Gaskell affair.”

50. Email correspondence between Troland and Cavagnero dated October 21, 2007 re “the Gaskell affair.”

51. Email correspondence between Troland and Cavagnero dated October 21, 2007 re “the Gaskell affair.”

52. Email correspondence between Shafer, Ferlan and Cavagnero dated October 22, 2007 re “questions re Fayette County re thoughts on Gaskell’s biology.”

53. Email correspondence between Shafer and Troland dated October 22, 2007 re “thoughts on Gaskell’s biology.”

54. Email correspondence between Cavagnero and Shafer dated October 22, 2007 re “questions re Fayette County re thoughts on Gaskell’s biology.”

55. Email correspondence between Steve Ellis and advisory committee members dated October 23, 2007 re “thoughts on Gaskell’s biology.”

56. Email correspondence between Cavagnero and Patty Bender dated November 1, 2007 re “Observatory Director search files.”

57. Email correspondence between Patty Bender, Mike Kovash and Tom Troland dated November 19, 2007 re “Observatory Director.”

58. Email correspondence from Cavagnero to Gaskell dated January 16, 2008 re “Observatory Director search.”

59. Email correspondence between Gaskell and Cavagnero dated January 16, 2008 re “observatory.”

60. Email correspondence between Cavagnero and Steven Hoch dated January 16, 2008 re “FWD Observatory.”

61. UKHR Posting Information re Job Title, Observatory Manager, October 22, 2008 re “not hired reason.”

62. Lecture notes “Modern Astronomy, the Bible, And Creation” authored by Martin Gaskell.

63. Email correspondence between Cavagnero and advisory Committee members dated October 17, 2007 re “the biologists weigh in.”

64. Email correspondence between Cavagnero and Sally Shafer dated August 20, 2007 re Observatory Director position.

65. Observations of Observatory Director applicants prepared September, 2007.

66. Email correspondence between Troland and Advisory Committee members dated October 23, 2007 re “report to Chair re Committee decision.”

67. Email correspondence between Troland and Advisory Committee members dated September 24, 2007 re “further deliberations re Director position.”

68. Email correspondence between Cavagnero and Advisory Committee members dated October 11, 2007 re “Martin Gaskell.”

69. Itinerary for Martin Gaskell interview, Wednesday, October 10, 2007

70. U.S. income tax return for Martin and Barbara Gaskell, 2007.

71. U.S. income tax return for Martin and Barbara Gaskell, 2008.

72. U.S. income tax return for Martin and Barbara Gaskell, 2009.

73. Email correspondence between Cavagnero and Shelly Steiner, date unknown, re “biologists weigh in.”

74. Notes from Shelly Steiner re evaluation of Gaskell’s lecture notes.

75. Email correspondence between Steiner and Gaskell dated January 16, 2008 re “Physics & Astronomy Department job search.”

76. Publication from the *Kentucky Kernel* dated November 19, 1997 re “Speaker Tries to Connect Science Reasoning with Religion.”

77. Email correspondence between Troland and Ferland dated September 23, 2007 re “important – meeting Monday re Observatory Director position.”

78. Email correspondence between Troland and Advisory Committee members dated October 16, 2007 re “Updates on Observatory Director search.”

79. Email correspondence from Troland to Ferland dated October 18, 2007 at 4:11 p.m., Subject: “re”.

80. Email correspondence between Troland and Ferland dated October 18, 2007 at 6:52 p.m.

81. Email correspondence between Troland and Ferland dated October 19, 2007 re “Gaskell almost certainly a dead duck.”

82. Email correspondence between Troland and Ferland dated October 19, 2007 re “Thoughts on Gaskell’s biology.”

83. Email correspondence between Troland and Ferland dated October 19, 2007 re “well said.”

84. Email correspondence between Troland and Ferland dated October 22, 2007 re “observatory outreach.”

85. Email correspondence between Levinson and advisory committee members dated September 28, 2007 re “Observatory Director matters.”

86. Email correspondence between Cavagnero and advisory committee members dated October 3, 2007 re “something to think about.”

87. Email correspondence between Cavagnero, Shafer and Troland dated October 4, 2007 re “biologist view?”

88. Email correspondence between Troland and Ferland dated October 25, 2007 re “your broken course”.

89. Email correspondence between Troland and Ferlan dated November 5, 2007 re “Tim’s our guy.”

90. Email correspondence between Troland and Gaskell dated January 15, 2008 re “Observatory.”

91. Email correspondence between Shafer and Troland dated September 25, 2007 re “further deliberations re Director position.”

92. Email correspondence from Cavagnero to advisory committee members dated October 3, 2007 re “something to think about.”

93. Email correspondence from Troland to Ferlan dated October 25, 2007 at 4:06 p.m. – no subject.

94. Email correspondence from John Pica to Cavagnero dated November 1, 2007 re “Observatory Director.”

95. Email correspondence from Cavagnero to John Pica dated October 26, 2007 re “report to the Chair re Observatory Director position.”

96. Email from John Pica to Cavagnero dated November 5, 2007 re “offer for Tim Knauer.”

97. Email from Troland to Ferlan dated October 23, 2007 re “that does it, Tim’s our guy.”

98. UK Governing Regulations, including non-discrimination policy, confidentiality of information policy, and use of the University’s name policy.

99. Notes prepared by Sally Shafer regarding interviews of Observatory Director candidates.

100. Email from Troland to Shafer dated October 22, 2007 re “thoughts on Gaskell’s biology.”

101. Email from Tim Knauer to Shafer dated September 18, 25 and 26, 2007 re “Jupiter with a Nikon S4,” re “good stuff,” and re “second equinox video.”

102. DVD of deposition of Steven Hoch, May 21, 2010.

103. Copy of a poster advertising Gaskell’s lecture, “Modern Astronomy, Science and the Bible,” November, 1997.

104. Gaskell’s Responses to Defendant’s Interrogatories and Requests for Production of Documents including a list of employers with whom he filed applications for employment and his complaints filed against his former employer, UNL

105. Deposition transcripts of any witnesses who testify for rebuttal purposes.

106. This Defendant reserves the right to introduce into evidence any exhibit introduced at any deposition which was taken by any of the parties in this case.

107. This Defendant reserves the right to introduce into evidence any exhibit identified by the Plaintiff and any exhibit necessary for rebuttal purposes.

### **STATEMENT OF THE FACTS**

In July, 2007, the University of Kentucky advertised and solicited applications for the position of Founding Director for the Commonwealth Observatory which was subsequently named the MacAdam Observatory. Martin Gaskell was one of the applicants for that position but was already known by the faculty in UK's Physics & Astronomy Department. In fact, Dr. Gaskell had been invited by the University to give a lecture on campus in November of 1997 on the topic of "Modern Astronomy, the Bible and Creation" which was widely attended.

In the course of the job search for the Observatory Director, the University formed an Advisory Committee comprised of faculty and staff from the Department of Physics & Astronomy. The Advisory Committee was charged with reviewing applications, conducting interviews and making recommendations to the Department Chair regarding its recommendation for the Director position. The Department Chair, in turn, made a recommendation to the Dean of the College of Arts and Sciences, who ultimately authorized the University to extend an offer of employment to Timothy Knauer, who continues to serve as Director of the University's MacAdam Observatory at the present time.

In the course of the job search, one of the Advisory Committee members researched Martin Gaskell and found lecture notes which Gaskell had published on his personal web site which was linked to his professional website at the University of Nebraska at Lincoln styled "Modern Astronomy, the Bible and Creation." This Advisory Committee member interpreted some of Gaskell's statements in his lecture notes as critical of the biological theory of evolution. The Advisory Committee discussed whether its members could evaluate Dr. Gaskell's public comments in the context of their Director search and solicited input from the University's Equal

Employment Opportunity Office, Legal Counsel, the Dean and the Provost on how to consider Gaskell's statements. The Committee was instructed that they could evaluate any publication by Dr. Gaskell for its scientific integrity. Opinions were solicited from the Department of Biology at the University since Gaskell's comments involved biology rather than astronomy. The biologists interpreted Gaskell's lecture notes as reflecting a non-scientific position on evolutionary science.

The issue which arose regarding Dr. Gaskell's comments at his public lecture in 1997 and his published lecture notes, was characterized by various Advisory Committee members as a "religious" issue, when in fact no one ever discussed Gaskell's religion. In fact, no one on the Advisory Committee was even aware of Gaskell's religion or religious beliefs. However, because Gaskell's public comments on biological evolution were discussed by the Advisory Committee, one member of that Committee concluded that his application was ultimately rejected on religious grounds. In fact, Gaskell's application was rejected because he was not the right candidate for the job, whereas the selected candidate, Timothy Knauer, was known to have more of the traits which the majority of the Committee believed the Observatory Director should possess. Knauer had worked with many members of the Advisory Committee when he was a graduate student at UK and held a masters degree in Physics from UK.

Subsequent to reaching the decision to hire Timothy Knauer as Observatory Director, a member of UK's Astronomy faculty allegedly told Gaskell that his application for the Observatory Director position was rejected on the basis of his religion. However, Gaskell was never asked about his religion during his telephone interviews nor during his on campus interviews. He was interviewed individually by each member of the Advisory Committee as well as an Assistant Dean and the Director of Undergraduate Studies in the Physics and Astronomy Department and the topic of religion was never addressed in any of these interviews.



During Gaskell's interview with the Chair of the Department of Physics & Astronomy, Mike Cavagnero told Gaskell that he had reviewed his lecture notes which Gaskell posted on the internet styled "Modern Astronomy, Science and The Bible" which contained Gaskell's affiliation with the University of Nebraska at Lincoln. Cavagnero advised Gaskell of the University of Kentucky regulation which provides, "Individuals writing or speaking publicly in a professional or expert capacity may identify themselves by their relationship with the University but if so identified then in all instances where the individual might give even the appearance of speaking on behalf of the University, care must be taken to emphasize that any views expressed are their own and not representative of the University of Kentucky". Gaskell's posted lecture notes included no disclaimer that the views expressed were his and not representative of the University of Nebraska at Lincoln. Dr. Cavagnero questioned Dr. Gaskell whether he would be able to conform to the University's policies. Dr. Cavagnero explained to Dr. Gaskell that the issues he addressed in his lecture notes were of particular interest in the Commonwealth of Kentucky since there is a museum located in Northern Kentucky called the Creationism Museum. Gaskell represented that he would have no difficulty complying with the University's regulation regarding his private interests and beliefs. At no time did Cavagnero ask Gaskell about his religion or his religious beliefs.

### **QUESTIONS OF FACT**

1. Did the University of Kentucky reject Martin Gaskell's application for employment as Observatory Director on the basis of his religious beliefs?
2. Was Gaskell's religion a motivating factor in UK's decision not to hire him as Observatory Director, even though other factors may have also motivated the decision?
3. If the University considered Gaskell's religion as a motivating factor in its hiring decision along with other factors which also motivated that decision, would the University have

rejected Gaskell as a candidate for the Observatory Director position regardless of his religious beliefs?

4. What damages, if any, has Gaskell suffered by reason of the University's decision not to hire him as Observatory Director?

#### **QUESTIONS OF LAW**

1. Has Gaskell produced sufficient evidence to raise a material issue of fact that he was a victim of discrimination on the basis of his religious beliefs by the University of Kentucky when it hired Tim Knauer rather than Gaskell for the position of Observatory Director?

2. Is there sufficient evidence to establish that Gaskell's religion was one of several factors considered by the University of Kentucky in rejecting his application for the position of Observatory Director?

#### **EXPECTED EVIDENTIARY OBJECTIONS**

The Defendant requests the Court to prohibit witnesses Michael Kovash and Gary Ferland from testifying regarding hearsay evidence. Specifically, neither Michael Kovash nor Gary Ferland served on the Advisory Committee which was charged with making recommendations to the Dean of the College of Arts and Sciences regarding the selection of the Observatory Director.

Gary Ferland was on sabbatical in Cambridge, England during the search process. Ferland was not present for any of the interviews or Advisory Committee meetings when there were discussions regarding the various candidates. Although he was included in many of the e-mail communications about the deliberations, the Advisory Committee members are the best witnesses to testify about what actually was discussed by the committee.

Michael Kovash served as Director of Undergraduate Studies in the Department of Physics & Chemistry during the search process. Kovash did not participate in any of the

Advisory Committee sessions but merely interviewed two of the three final candidates. At no time during Kovash's interview with Gaskell did the topic of religion come up. Although Kovash asked the University's Equal Employment office to look into whether the search process violated Gaskell's religious rights, he did so based entirely on statements Tom Troland made which are hearsay.

Since neither Ferland nor Kovash have any personal knowledge regarding the discussions that took place among the Advisory Committee members and did not converse directly with any Advisory Committee member regarding the reasons that each member made his or her recommendations, they are not competent to offer any testimony regarding the search process and why Gaskell was ultimately rejected for the position of Observatory Director.

If Michael Kovash testifies at trial, the Court is requested to prevent him from offering any testimony that Advisory Committee member Sally Shafer, is "anti-religious". Kovash was married to Shafer in the distant past but has had no relationship with her for the last ten years although they worked in the same department at UK. Kovash had no discussions with Shafer during the search process about her opinions about any of the candidates including Gaskell and he has no personal knowledge why Shafer decided to support any candidate. If Kovash has any information about Shafer's participation in the search process, it is because he had discussions with Tom Troland about the process and therefore, the basis for his information is hearsay and not admissible at trial. Furthermore, if Kovash is permitted to offer his opinion about Shafer's religious preferences, it will open the door for impeachment on the collateral issue of Kovash's bias against Shafer based on marital differences that have nothing to do with this trial and will likely confuse the jury about what the issues are in the case.

The Defendant also requests that the Court prevent all witnesses from being asked the ultimate issue of fact in this case, i.e., whether Gaskell's religion was a factor in the University's hiring decision for the Observatory Director. Many of the exhibits which will be introduced in

this case characterize this issue as a religious issue. The Defendants submit that it is up to the jury to determine from the facts whether Gaskell's religion played a role in the hiring decision, and by allowing any witness to testify that he or she believed religion was a factor invades the province of the jury. All e-mail exhibits should be redacted of any conclusory statements that Gaskell's religion prevented him from being hired as Observatory Director.

**PENDING MOTIONS**

At this time, there are no pending motions.

Respectfully submitted,

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s/BARBARA A. KRIZ  
*Counsel for Defendant, University of Kentucky*

**CERTIFICATE OF SERVICE**

I hereby certify that on **December 16, 2010**, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Francis J. Manion, Geoffrey R. Surtees and Edward L. White, III.

s/Barbara A. Kriz  
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