

**NOTIFY**

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 2384CV00395-BLS1**

**BENJAMIN EDELMAN**

**vs.**

**PRESIDENT & FELLOWS OF HARVARD COLLEGE**

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION TO DISMISS**

Plaintiff Benjamin Edelman (“Edelman”) commenced the present action against the President & Fellows of Harvard College (“Harvard”), following the 2017 denial of his renewed tenure application at Harvard Business School (“HBS”). The matter is before the court on Harvard’s Mass. R. Civ. P. 12(b)(6) motion to dismiss the Complaint. Following a hearing on December 15, 2023, and consideration of the parties’ submissions, the motion is **DENIED**.

**BACKGROUND**

The Complaint, and relevant documents attached to the parties’ submissions,<sup>1</sup> set forth the follow facts.

A. **HBS Tenure Process**

The tenure process at HBS is guided by two policies: HBS’s Policies and Procedures with Respect to Faculty Appointments and Promotions (“Tenure Policy”) and the Principles and Procedures for Responding to Matters of Faculty Conduct (“P&P”). The Tenure Policy sets forth the standards a faculty member must meet to obtain tenure and the attendant procedures to be followed. The P&P becomes applicable if concerns about a faculty member’s conduct have

---

<sup>1</sup> The Harvard policies and relevant correspondence attached were relied upon in the framing of the Complaint. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011).

been raised.

Under the Tenure Policy, candidates must satisfy criteria relating to their intellectual and teaching contributions, as well as their “Contributions to the HBS community.” The latter requires candidates to “uphold HBS Community Values,” including “[a]ccountability for personal behavior.” After a candidate submits the required materials, a subcommittee of the Appointments Committee, which consists of HBS’s tenured faculty, evaluates the candidate’s tenure application and prepares a report with its recommendation. Based on that recommendation, the Appointments Committee takes an advisory vote, after which the Dean decides whether to recommend a tenure grant to Harvard’s President.

In the context of “Promotions, Reviews, and Reappointments,” the P&P provides that in “cases where previous or current conduct raises a question of whether the candidate meets the School’s criteria for ‘Effective Contributions to the HBS Community’” a Faculty Review Board (“FRB”) will be asked to undertake a review. Under the P&P, the FRB Chair begins the process by drafting a summary of the allegation “as it is known at the time.” The FRB then “investigate[s] the allegation,” which may include interviews and document review, after which the FRB prepares a draft report containing “the evidence gathered; comments on the seriousness of the offense, including the FRB’s conclusions on whether the misconduct has occurred.” The faculty member is provided “an opportunity to review the allegation, the evidence gathered, and the draft report” and to respond in writing. The process concludes with the FRB finalizing the report and communicating its conclusions to the subcommittee evaluating the candidate’s tenure application.

The P&P explains that in carrying out the above procedures, which are “designed to be flexible,” the FRB should be guided by “[t]he following principles and considerations”:

- Every reasonable effort should be made to protect the reputations of the individuals involved.
- The faculty member being reviewed by the FRB and the individual raising the concern should be kept informed throughout about the steps of the process and the anticipated timeline.
- Privacy and confidentiality are important considerations; information generally should be shared only on a need-to-know basis, and consistent with what is practicable.
- Allegations should be articulated in writing and evidence presented clearly.
- Recognizing that it can be difficult to anticipate every circumstance that may arise, the individuals responsible for administering the FRB procedure will use their best efforts and judgment.

#### B. Edelman's Attempt to Obtain Tenure

In 2015, Edelman was a tenure-track associate professor at HBS. That year, he applied for tenure at HBS. In conjunction with his application, HBS referred Edelman's case to the FRB due to concerns about his conduct. The FRB Chair identified the scope of its review as pertaining to Edelman's "interactions with staff and other colleagues at the School, including around case copyright, travel arrangements, business cards, and classroom projectors," as well as two external incidents from 2014. The first involved a blog post Edelman wrote about an adware company, Blinkx, after which questions were raised about the adequacy of Edelman's disclosure of a certain consulting relationship. Edelman made the disclosure more detailed upon HBS's request. The second concerned Edelman's dispute with a Brookline restaurant over its practice of charging customers more than the prices listed on its online menu. The tone of Edelman's communications was publicly criticized, and, at HBS's request, Edelman publicly apologized.

Following its review, the FRB issued a draft report, concluding that Edelman had not upheld HBS's Community Values in the Blinkx or restaurant incidents, or in two other concerns that were internal to HBS. The FRB then provided its final report to the subcommittee evaluating Edelman's tenure application, along with Edelman's responses. Ultimately, the subcommittee recommended that Edelman's tenure case be delayed for two years, which he

accepted. For the next two years, Edelman continued his teaching and other activities at HBS.

In March 2017, Edelman submitted materials to restart the tenure review process and sent a letter to the FRB describing what he had learned from his past conduct. Thereafter, the FRB Chair informed Edelman by letter that it was reconvening to examine three questions: whether Edelman understood why his past behavior was problematic, whether he demonstrated “changed behavior,” and whether he was likely to sustain changed behavior in the future. The letter did not contain any allegations of new misconduct. In August 2017, Edelman met with the FRB and answered questions about his experiences in the past two years, and what he had learned.

In September 2017, the FRB notified Edelman for the first time that it was also undertaking an examination of his activities outside HBS, and asked him to provide information on all his outside activities for the past two years. After Edelman responded, on September 27, 2017, the FRB issued its draft report (“2017 Draft Report”). It contained both positive feedback and twelve anonymous negative comments. The 2017 Draft Report also suggested, as to Edelman’s outside activities, that he should have disclosed previous consulting work for Microsoft in certain works he wrote about Google, and that Edelman’s work in an airline class-action lawsuit could potentially represent a “reputational risk” for HBS. Although Edelman attempted to rebut these statements within the short timeframe for response afforded, the FRB made no material revisions in the final report it provided to the Appointments Committee.<sup>2</sup>

Prior to the Appointments Committee vote, the Dean took the position, apparently not previously taken with any other candidate, that he would advance Edelman’s case for tenure to the University’s President only if two-thirds of the faculty voted in favor of tenure. Edelman fell just short of the super majority required. Because Edelman was not granted tenure, his

---

<sup>2</sup> None of the draft or final reports were attached to the Complaint, or submitted by Harvard in connection with its motion to dismiss. References to their contents are accordingly drawn from the allegations in the Complaint.

employment at HBS ended.

On February 14, 2023, Edelman commenced the present case, asserting claims for breach of contract (Count 1), breach of the covenant of good faith and fair dealing (Count 2), and promissory estoppel (Count 3). The claims arise out of the FRB's alleged failure to comply with the provisions of the P&P, which prejudiced Edelman's ability to respond to the allegations against him. He also alleges that two individuals who served on the FRB, had personal conflicts of interest, which also biased the result of his tenure application.

### **STANDARD OF REVIEW**

Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure allows for dismissal of a complaint when the factual allegations contained within it do not suggest a plausible entitlement to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008); *Fraelick v. Perket PR, Inc.*, 83 Mass. App. Ct. 698, 699-700 (2013). In ruling on a motion to dismiss, the court accepts the factual allegations as true and draws all reasonable inferences in the non-moving party's favor. *Fraelick*, 83 Mass. App. Ct. at 699-700.

### **DISCUSSION**

#### **I. Breach of Contract (Count 1)**

As stated, Edelman asserts that Harvard failed to adhere to several P&P provisions in connection with his 2017 tenure review, which provisions are contractual in nature.<sup>3</sup> Contractual claims arising from faculty handbooks and written university policies are to be interpreted under "the standard of reasonable expectation — what meaning the party making the manifestation, the university, should reasonably expect the other party to give it." *Berkowitz v. President & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269-270 (2003) (citation omitted). Under this

---

<sup>3</sup> Harvard does not contest that the P&P creates an enforceable contract for purposes of its motion.

standard, even an expectation not expressly reflected in the contract will be considered reasonable if when “viewed objectively alongside the express terms of the contract,” it “is based on the . . . fair interpretation of the contract’s provisions.” *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 709 (1st Cir. 2022). However, “in the absence of a violation of a reasonable expectation created by the contract . . . or arbitrary and capricious conduct by the university . . . courts are not to intrude into university decision-making.” *Berkowitz*, 58 Mass. App. Ct. at 269-70 (internal citations omitted). This principle is particularly true of tenure decisions, which necessarily involve subjective judgments about a candidate’s qualifications. *See id.*, and cases cited.

Edelman first asserts that the FRB failed to properly disclose “the evidence gathered,” both within the 2017 Draft Report and to him, as required by the P&P’s express language. Edelman further argues that the FRB failed to present the evidence “clearly,” which the P&P also requires. Rather, according to Edelman, the negative comments in the 2017 Draft Report were anonymous and lacking in context, which prevented him from being able to substantively rebut the assertions against him. Harvard counters that, given the P&P’s confidentiality and privacy language, and its disclaimer that the process is “designed to be flexible,” more information was not required. Viewing the allegations in Edelman’s favor, and applying the reasonable expectation standard, Count 1 plausibly states a claim for relief. The extent to which the “evidence gathered” must be disclosed, in light of the other language in the P&P, is unclear. Harvard’s compliance with that language also cannot be determined until the court is able to review the 2017 Draft Report, which is not yet part of the record.

Edelman also argues that the FRB failed to provide him timely notice at the outset of the 2017 review that it would include his outside activities, and that adding that issue improperly expanded the investigation’s scope. The P&P requires that the FRB Chair draft a “summary of

the allegation, as it is known at the time” at the outset of the FRB process. The 2017 allegation summary informed Edelman that Harvard was looking at whether his behavior had changed, but did not specifically mention a review of his outside activities. Although recent conduct logically would be a metric of changed behavior, in the absence of a full record, whether the additional conduct falls within the scope of original allegation, and whether Edelman’s opportunity to respond fell within reasonable expectation, likewise cannot be determined at this stage. *See generally Barry v. Trustees of Emmanuel Coll.*, 2019 WL 499774, at \*7-\*8 (D. Mass. 2019) (genuine issues of material fact remained on faculty member’s reasonable expectations in tenure application process).<sup>4</sup>

The motion to dismiss the breach of contract claim (Count 1), is accordingly **DENIED**.

## **II. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count 2)**

The covenant of good faith and fair dealing is implied in all contracts, and is breached “when one party violates the reasonable expectations of the other.” *Robert & Ardis James Foundation v. Meyers*, 474 Mass. 181, 188 (2016) (citation omitted). However, “it may not be invoked to create rights and duties not otherwise provided for in the existing contractual relationship.” *Vacca v. Brigham & Women’s Hosp., Inc.*, 98 Mass. App. Ct. 463, 470 (2020) (citations omitted).

Edelman alleges that Harvard breached the implied covenant by engaging in the above procedural violations, and by including staff members on the FRB that had personal conflicts with him, misrepresenting his outside work, and falsely suggesting that he had failed to make necessary disclosures. A full record is required to determine whether the review process met reasonable expectations based on the language of the P&P. The motion to dismiss Count 2 is

---

<sup>4</sup> Adding additional uncertainty is the fact that the P&P does not specifically address the FRB’s role in renewed applications for tenure that originally involved an FRB review.

**DENIED.**

**III. Promissory Estoppel (Count 3)**

“To prevail on a claim for promissory estoppel, a plaintiff must establish that (1) the defendant made a promise which [it] should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the [plaintiff], (2) the promise does induce such action or forbearance, and (3) injustice can be avoided only by enforcement of the promise.”

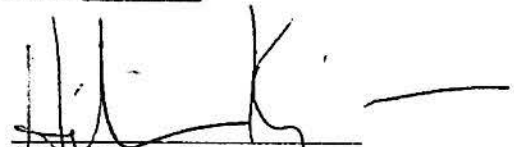
*Vacca*, 98 Mass. App. Ct. at 472-73 (internal quotes omitted). The promise must be unambiguous. *Rhode Island Hosp. Tr. Nat. Bank v. Varadian*, 419 Mass. 841, 848 (1995).

Edelman’s allegation that he forewent other opportunities in detrimental reliance on Harvard fairly administering his promotion application and complying with the procedures contained in the P&P plausibly states a claim for relief. The motion to dismiss Count 3 is therefore

**DENIED.**<sup>5</sup>

**ORDER**

For the foregoing reasons, Harvard’s motion to dismiss is **DENIED.**

  
Hélene Kazanjian  
Justice of the Superior Court

Date: March 18, 2024

---

<sup>5</sup> Promissory estoppel is typically asserted as an alternative theory of recovery to a breach of contract claim where proof of consideration is lacking. See *Rhode Island Hosp. Trust Nat’l Bank*, 419 Mass. at 849-850; *Merricks v. Savers, Inc.*, 2012 WL 32579 \*2 (D. Mass. 2012). Such alternative pleading is permissible here where Harvard does not concede that the Tenure Policy and P&P are binding contracts between the parties.