

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT

BENJAMIN EDELMAN,

Plaintiff,

v.

**PRESIDENT & FELLOWS OF
HARVARD COLLEGE,**

Defendant.

CIVIL ACTION NO. 2384CV00395-BLS2

**HARVARD'S REPLY TO PLAINTIFF'S OPPOSITION TO HARVARD'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

**PRESIDENT & FELLOWS OF HARVARD
COLLEGE**

By its attorneys,

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Dated: May 22, 2023

I. INTRODUCTION

Plaintiff's Opposition to Harvard's Motion to Dismiss makes plain the fatal flaws in Plaintiff's Complaint. Plaintiff has failed plausibly to allege that the review the Harvard Business School ("HBS") Faculty Review Board ("FRB") conducted in 2017—a review designed to help the HBS's Dean and faculty decide whether he met a central criterion for tenure at HBS, adherence to HBS's stated Community Values—breached any contractual obligation Harvard owed him. No matter how vociferously Plaintiff professes his own brilliance as a scholar, Plaintiff's Complaint shows that serious doubts about his judgment, not Harvard's violation of his rights, scuttled Plaintiff's tenure application. HBS' actions were fully consistent with its policies, including those governing the FRB. None of the cases Plaintiff cites, nor his wishful thinking about what HBS policies require, undermine the arguments Harvard has advanced. Harvard respectfully requests that the Court dismiss Plaintiff's Complaint.

II. ARGUMENT

A. **In Plaintiff's Case, No Allegation of Egregious, Persistent or Pervasive Conduct Was Required to Trigger an FRB Review.**

Plaintiff's Complaint leaves no room for doubt about one fact about which Harvard and Plaintiff agree: the FRB's work in 2015 and 2017 occurred in connection with HBS's consideration of his application for tenure. *See, e.g.*, Complaint ¶¶ 1, 29-30, 32, 71. But Plaintiff's Opposition effectively disregards the section of the Principles and Procedures for Responding to Matters of Faculty Conduct ("FRB Principles") that specifically describes the FRB's work in connection with a tenure review. Like the Complaint, Plaintiff's Opposition contends that an FRB review may only be triggered by "instances of *egregious* behavior or actions, or incidents that indicate a *persistent and pervasive pattern* of problematic conduct." Plaintiff's Opposition, at 13 (emphasis added by Plaintiff). This misreads the FRB Principles. Ex. 2.¹

¹The exhibit numbers in this reply refer to the exhibits attached to Harvard's Memorandum in Support of its Motion to Dismiss.

The FRB Principles make clear that allegations of egregious behavior or persistent or pervasive problematic conduct are not required to convene the FRB during a tenure review. Under the heading, “Notes on Promotions, Reviews and Reappointments,” the FRB Principles call for HBS officials to meet in connection with every tenure review to “discuss whether *concerns about conduct* have been raised for upcoming candidates for promotion, review, and reappointment” (emphasis added). *Id.* at 3. Where “previous or current conduct raises a question of whether the candidate meets the School’s criteria for ‘Effective Contributions to the HBS Community,’ the FRB will be asked to undertake a review . . .” *Id.* Common sense suggests why HBS—or any organization—would employ one standard (here “concerns about conduct” or a “question about conduct”) to trigger a review in connection with a promotion decision and a separate, higher standard to trigger an investigation in connection with potential disciplinary action. That is particularly true in the context of promotion to tenured professor, a position that effectively carries a lifetime appointment and one which Massachusetts courts give private colleges and universities broad leeway to make. *See Berkowitz v. President & Fellows of Harv. Coll.*, 58 Mass. App. Ct. 262, 268 (2002).

Further, Plaintiff’s actions, as alleged in the Complaint, demonstrate that he knew that the FRB would play a role in his 2017 tenure review—with or without new claims of “egregious” conduct. Indeed, in March 2017, when Plaintiff submitted his renewed tenure application, Plaintiff also submitted what he describes as a “thoughtful letter” to the FRB “describing what he had learned from the events it had criticized in 2015 . . . [and] provided a lengthy list of faculty and staff who he believed would attest to positive interactions with him.”² *Id.* ¶47. Plaintiff cannot plausibly allege that the FRB would take no action in these circumstances. To the contrary, Plaintiff invited the FRB to do so.

² Plaintiff’s Opposition states that “Plaintiff was instructed by his unit head to write to the FRB about his progress since 2015, and did so.” Plaintiff’s Opposition, at 14. But his Complaint does not contain this allegation, *see* Complaint, ¶ 47, so the Court should ignore it.

B. The Court Should Also Reject Plaintiff’s Claim that the FRB Failed to Provide Timely Notice of the Subject of Its Review or Improperly Expand the Scope of its Work.

Plaintiff’s Complaint fails to plausibly allege that the FRB’s 2017 review violated Harvard’s policies by failing to provide notice of its intended work or improperly expanding its scope. To the contrary, as Plaintiff’s Complaint itself alleges, the FRB gave Plaintiff notice of the concerns it planned to review on two separate occasions: in 2015, in connection with his original tenure review, and again in 2017, when he sought tenure a second time. *See* Complaint ¶ 33 (2015 tenure review); ¶ 47 (2017 tenure review). In 2015, the FRB Chair informed Plaintiff that it planned to review his “blog posting about Blinkx,” his “interaction with Sichuan Garden” and “concerns . . . about [Plaintiff’s] interactions with staff and other colleagues at the School” *Id.* ¶ 33. In 2017, when Plaintiff again sought tenure, the FRB described the issues it intended to review with equal clarity. It informed Plaintiff it intended to address:

- Whether you understand the aspects of your conduct—regardless of your intent—that made them problematic;
- Whether there is sufficient evidence of changed behavior;
- Whether there is a reasonable expectation that your changed behavior will be sustained in the future.

Id. ¶ 33. First, no reasonable reader, never mind an “indisputably successful” “lawyer and respected consumer advocate [who had] rack[ed] up thousands of citations to his numerous academic publications” could be confused by the issues the 2017 FRB announced its intention to review. As Plaintiff himself alleges, the 2015 FRB had concluded that “Plaintiff had not upheld HBS’s Community Values in the Blinkx or Sichuan Garden incidents, or in certain interactions with others at HBS.” *Id.* ¶ 36. The 2017 FRB asked whether he had understood the FRB’s concerns, had changed his behavior and, if so, whether that change was likely to persist. Second, the issues the Complaint alleges the 2017 FRB improperly focused on—disclosures related to his work for Google and his work as counsel in a class action against American Airlines—*id.*, ¶¶ 62-68, fall

squarely within the central questions the 2017 FRB told Plaintiff it would review: had he learned anything from the events of 2015; had he changed; and if so, was that change likely to last? Plaintiff may well disagree with the conclusions the FRB reached, but he cannot plausibly claim that he did not understand the issues the FRB itself said it would review.

C. **The Court Should Also Reject Plaintiff’s Claim that the FRB Did Not Disclose the Evidence Against Him.**

Plaintiff has also failed plausibly to allege that the FRB violated its policies by failing to include “the evidence gathered” in its 2017 Report. Plaintiff’s Complaint shows that the FRB’s report did include the evidence gathered, which the Complaint itself described in detail. *Id.*, ¶¶ 54-70. Plaintiff’s claims that the FRB should have identified every witness or provided transcripts of witness interviews finds no support in the FRB Principles themselves, particularly given the stated need for the FRB to gather information confidentiality and the critical role confidentiality plays in the tenure process. *See* Ex. 1 at 11-12 (describing confidential nature of tenure process) Ex. 2, at 2-3 (describing need for confidentiality at the FRB). Moreover, the FRB Principles make clear that the FRB should not take a one size fits all approach to every review: those Principles are “intended to provide a *framework* to allow an appropriate resolution of concerns in a wide variety of circumstances” and were “designed to be flexible, recognizing the need to weigh multiple factors such as the nature and seriousness of the conduct in question, the supporting evidence, and any mitigating factors and circumstances.” *Id* (emphasis added).

The cases Plaintiff cites do not advance his cause. Plaintiff relies on *Sonoiki v. Harvard Univ.*, 37 F. 4th 691 (1st Cir. 2022), arguing that there “the First Circuit found that a motion to dismiss a student respondent’s contract claims should have been denied because Harvard did not share the identities of adverse witnesses with him.” Plaintiff’s Opposition, at 10. But in *Sonoiki*, the First Circuit described a different Harvard School’s policy for student discipline that was more specific than the FRB Principles. The Harvard College student discipline policy at issue in *Sonoiki* allowed “the student’s Board Rep [] to inform them about what each witness says during the

interviews and share any information that comes to light during the interviews” and “provide the student with ‘copies of all documents and other information obtained by the fact finder and subcommittee.’” *Sonoiki*, 27 F. 4th at 712.³ The FRB Principles say nothing of the kind.

Plaintiff also relies on *Charest v. President and Fellows of Harv. Coll.*, No. 13-11556, 2016 WL 612438 **16, 18 (D. Mass. Feb. 16., 2016). There, although the Harvard policy at issue “did not dictate any specific procedural formalities that must be followed,” Harvard directly communicated “specific procedural promises to [the plaintiff].” *Id.* Here, the Complaint does not allege that anyone from Harvard made any representations to him about how the FRB would proceed.⁴

III. CONCLUSION

Plaintiff is undoubtedly disappointed in the results of the 2017 FRB review and the 2017 tenure process. But he has failed to allege facts that plausibly suggest that either the 2017 FRB review or the decision not to award tenure violated his rights. Harvard respectfully request that the Court dismiss Plaintiff’s Complaint.

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By its attorneys,

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³ Harvard expects to move for summary judgment on the few remaining issues in the *Sonoiki* case, including this one.

⁴ Plaintiff also relies on *Barry v. Trs. of Emmanuel Coll.*, No 16-cv-12473-IT, 2019 WL 499744 (D. Mass. 2019) to support his claim that his rights were violated by the participation in the FRB of two university administrators “who disliked him” Plaintiff’s Opposition, at 18. But in *Barry*, the policy at issue explicitly required the participation of a person holding a specific administrative official in the tenure process, and the plaintiff alleged that the defendant College substituted a biased professor for the person who occupied that position. *Id* at *6. Plaintiff points to no analogous provision in the FRB Principles.

Dated: May 22, 2023

CERTIFICATE OF SERVICE

I, Martin F. Murphy, certify that on May 22, 2023, a copy of this document was served via email on the following individuals:

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