COMMONWEALTH OF MASSACHUSETTS

Superior Court **Suffolk, SS**
Business Litigation Session

BENJAMIN EDELMAN, Plaintiff, v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE, Defendant.	)	Civil Action 2384CV00395-BLS2

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

By its attorneys,

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INTRODUCTION

In 2017, Dean Nitin Nohria decided to deny tenure to Plaintiff Benjamin Edelman's because he had significant concerns about Plaintiff's judgment—concerns that in Dean Nohria's view raised too many questions for Plaintiff to receive the "privilege of lifetime employment." SF¶116. Plaintiff's attempts to avoid the entry of summary judgment by offering excuses (for, example, that he would have been able to more effectively rebut the FRB's conclusions about his conflict of interest disclosures if the FRB had given him more time) or by complaining that the FRB was biased against him, even going so far as to falsely claim that an FRB member "fabricated" evidence against him, fail to create a genuine issue of material fact. Because (1) the FRB Principles do not form an enforceable contract; (2) Plaintiff has failed to prove that the FRB failed to follow those principles and (3) in the end, Dean Nohria's decision was independent of any of the FRB's alleged failures to follow the FRB Principles, summary judgment should enter in Harvard's favor.

ARGUMENT

A. The Undisputed Facts Establish That the FRB Principles Were Not a Contract

The undisputed facts establish that the FRB Principles were not a contract between HBS and Plaintiff, and it was unreasonable for him to believe they were. Because the "[p]rinciples stated in the *Jackson* opinion remain sound" (*O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 691 (1996)), Massachusetts state and federal courts have continued to use the factors *Jackson v. Action for Bos. Cmty. Dev. Inc.*, 403 Mass. 8 (1988), described in assessing whether a policy or other document formulates a contract. In particular, those factors are useful in determining, at summary judgment, whether Plaintiff's belief that the FRB Principles had the force of contract were, as Plaintiff contends, "reasonable under the circumstances." (Opp. 9, citing *Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49, 55 (D. Mass. 1996).) *See O'Brien,* 422 Mass. at 692 ("The

various circumstances discussed in the *Jackson* opinion . . . explain factors that would make a difference or might make a difference in deciding whether the terms of a personnel manual were at least impliedly part of an employment contract."); *see also Grant v. Target Corp.*, 2017 WL 2434777, *4-5 (D. Mass. Jun. 5, 2017); *Englund v. Big Y Foods, Inc.*, 98 Mass. App. Ct. 1102, *2-3 (2020) (unpublished). Plaintiff has not demonstrated that his belief was reasonable, and the balance of evidence demonstrates that it was not.

Plaintiff challenges among other things Harvard's argument regarding the nature of the FRB Principles as *guidance* for the FRB, but even the case law he cites recognized this as an important consideration. *See Warren v. Children's Hosp. Corp.*, 652 F. Supp. 3d 135 (D. Mass. 2023) (stating that the policy stating that it was "intended to serve as a guide" was a factor *against* the reasonability of plaintiff's belief that the policy was a contract). In addition to the language already cited by Harvard (Mem. 13), the FRB Principles contain additional language demonstrating their purpose as a *guide*: "In some instances…a more structured procedure *may be needed*"; "the Dean *may choose* to refer the allegation to a Faculty Review Board"; "[t]he FRB *typically* will comprise a faculty chair, two additional faculty members, and a senior staff member"; "The FRB, aided *in some instances* by a fact finder"; "[t]he investigation *may require factual inquiry*;" "once modifications and edits, *if the FRB deems them* appropriate or necessary"; "[t]he Senior Associate Dean for Faculty Development will meet annually *or as otherwise needed*"; "[i]n this meeting, the FRB Chair and Executive Dean *would report* on early complaints;" "the FRB and Executive Dean *may seek and report on* confidential input." (FRB Principles 1-3.) Such explicit language throughout a document just over three pages long does not just "indicate[] flexibility" (Opp. 10); it demonstrates that Plaintiff's expectation that such language was contractually binding was unreasonable.

B. The FRB's Alleged Procedural Failures Did Not Cause Harm to Plaintiff

Plaintiff bears the burden at summary judgment to "provide evidence supporting a finding that he was harmed by any procedural errors committed by Harvard, or that the errors affected the cases' outcomes." *Sonoiki v. Harvard Univ.*, 2024 WL 760844, *17 (D. Mass. Feb. 6, 2024). Plaintiff has not demonstrated a genuine dispute—or provided any evidence at all—that Dean Nohria's decision regarding Plaintiff's tenure would have changed if the FRB had conducted its 2017 review the way that Plaintiff claims it should have. He cannot do so, because Dean Nohria decided against Plaintiff's tenure case for reasons based on Plaintiff's *actions*, not because of any of the alleged violations to the FRB Principles that Plaintiff claims were committed:

> The FRB's concerns about Prof. Edelman's judgment around the American Airlines lawsuit and his insufficient disclosures—concerns which I personally shared—independent of the concerns about his respect for others inside the institution expressed in the FRB's 2017 report, were sufficient on their own for me to conclude to recommend against tenure and I would have decided not to recommend Prof. Edelman for tenure even if the FRB's 2017 report had not addressed any issues related to respect for others.

(Ex. 183, ¶13.) Regardless of whether the FRB Principles set out contractual terms (they did not) that were breached (they were not), Harvard is entitled to summary judgment because none of Plaintiff's claimed procedural violations caused Plaintiff's tenure denial.

Plaintiff claims that Dean Nohria's decision to deny him tenure was based on a "flawed report," and asserts that the FRB's "failure to articulate an allegation," its "expansion of scope," and its "failure to investigate and reach conclusions" all "primarily" concerned the 2017 Report's review of his outside activities and conflict of interest disclosures (i.e. the American Airlines lawsuit and Microsoft disclosures). (Opp. 23; *see* Ex. 26.) Harvard discusses each of these in turn.

Failure to articulate an allegation. Plaintiff claims that he was harmed because in 2017, the FRB failed to articulate an allegation. He argues in particular that, if the FRB had told him earlier that it had concerns about the disclosures in his writings on Google, he could have done a

better job addressing them. (Opp. 18-19.) Neither of these claims is sufficient to avoid the entry of summary judgment. Plaintiff does not dispute that there was an allegation in 2015. SF¶¶29-30. When the FRB formally re-convened in 2017, it stated precisely, in three statements, what its focus was. SF¶59. The FRB Principles called for the FRB to give Plaintiff an opportunity to review and respond to the draft report. Plaintiff was given 8 days to do so. (Ex. 149.) That he did not feel he had the time to "effectively rebut these concerns" (Opp. 19) is not relevant to whether the FRB Principles were breached, as the FRB Principles do not provide a minimum amount of time that a faculty member must be given to review an allegation and respond to it.

Nor has Plaintiff provided evidence that if the FRB had asked earlier about his written disclosures, Dean Nohria's decision would have changed. Plaintiff does not dispute that Dean Nohria was entitled to evaluate the quality of his judgment on issues of conflict of interest. (Ex. 3, 258:16-21; SF¶90.) Dean Nohria has made clear that his concerns about Plaintiff's judgment were what led him to decide against recommending Plaintiff for tenure. (Ex. 183, ¶13. Plaintiff claims he "omitted" arguments about his disclosures from his 2017 Reply to the FRB. (Ex. 182, ¶22.) Most illustratively, one such argument Plaintiff omitted was that his "work with Microsoft was not directly related to the work product" of the articles the FRB considered in its review. (*Id*.) Yet this sort of unilateral determination, focused on Plaintiff's views about the *minimum* disclosures required, is exactly what concerned the FRB in 2015 about Plaintiff's Blinkx disclosures, leading to the two-year delay in his tenure case and the FRB's 2017 assessment of whether he understood the problematic aspects of his conduct and had changed his behavior accordingly. SF ¶59. The 2017 FRB Report *precisely* articulated why this argument—even if Plaintiff had made it in 2017—would not have changed the outcome of Dean Nohria's decision: "one might expect the need for appropriate disclosures to be top of mind for Professor Edelman

during this time period, given the express concern raised by the FRB [in 2015] about 'the public's trust in the independent and objective nature of [his] scholarship." (Ex. 26.) Plaintiff did not demonstrate—nor does he now, 8 years later—that he had exercised proper judgment when it came to his disclosures and has therefore failed to support his burden of showing that Dean Nohria's decision would have been different had the allegation come earlier.

Expansion of Scope. Plaintiff has not demonstrated a genuine dispute that the FRB's focus on disclosures in his writing was outside the scope of the FRB's 2017 review. Here, again, Plaintiff improperly reads requirements into the FRB Principles that simply are not there, namely that the FRB needed to first share this "new allegation" with him prior to investigating it. (Opp. 20.) The FRB Principles contain no such temporal constriction—they merely provide that respondents will have an opportunity to review an allegation and respond in writing. (Ex. 18 at JA-367.)

Here, too, Plaintiff argues that if he had more time to rebut the allegations, Dean Nohria's decision would have been different. (Opp. 20-21.) Plaintiff misses the point again: the FRB and Dean Nohria were focused on his judgment. Plaintiff does not articulate why, had the FRB stuck with its "inquiry into Plaintiff's progress since 2015 and the compliance with the requirements he had agreed to in 2015" (Ex. 175 ¶97), an inquiry into his judgment on outside activities and disclosures[1] would not have been properly within the scope of the 2017 Report.[2]

Failure to Investigate the Allegation. Plaintiff claims the FRB did not perform an

[1] Topics the 2015 FRB Report was also focused on. (Ex. 14 at JA-281-84.)

[2] Plaintiff's argument about the allegation and scope would also read into the FRB Principles a requirement that the FRB would need to issue a new, specific allegation each time its work generated a new line of inquiry, no matter how closely related to the subject matter of the FRB's work already underway. Such a requirement is untenable and not supported by a reasonable reading of the FRB Principles.

investigation or reach a conclusion. (Opp. 21.) The FRB Principles state that an FRB's "investigation may require factual inquiry, interviews, and the review of materials (e.g., documents, email exchanges, social media)." (Ex. 18 at JA-367.) In 2017, the FRB did exactly that: it interviewed faculty and staff and reviewed materials, including documents provided by Plaintiff about his outside activities and articles cited in the 2017 FRB Report. (Ex. 26; SF ¶¶62, 75.) Plaintiff does not explain why activities contemplated by the FRB Principles as constituting an investigation do not actually constitute an investigation. Instead, he claims that "the FRB would have had to examine specific incidents in light of applicable policies," but cites to neither legal authority nor the FRB Principles to support this narrow view. (Opp. 21.)

This claim is also contradicted by his own admissions about the facts: the FRB did examine his disclosures on work product relating to Google (among other claims) and did so with explicit reference to both the Conflict of Interest Policy and the 2015 Report.[3] (Opp. 20; Ex. 26.) This and the other matters discussed in the 2017 Report led the FRB to the explicit conclusion that the FRB was "unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved." (Ex. 26 at JA-425.) That the FRB's investigatory activities led it to a conclusion that Plaintiff did not like does not mean there was no investigation or conclusion.

As with his other claims, Plaintiff does not argue that Dean Nohria would have come to a different decision about Plaintiff's tenure case had these alleged breaches not occurred. (Opp. 23.) He cannot, even though it is his burden to do so. *Sonoiki*, 2024 WL 760844at *17. Plaintiff also does not address the FRB's examination of the American Airlines lawsuit in any of the above claims (Opp. 18-21), even though Dean Nohria was particularly concerned about what his decision

[3] Harvard does not concede that FRB Principles limited the FRB to only conducting a review in light of specific policies.

to initiate the lawsuit (without consulting or informing anyone in the Dean's Office) indicated about Plaintiff's judgment. (SF ¶¶66-67, 107-110; Ex. 183 at ¶7; Ex. 8 at 140:5-15.)

Finally, Plaintiff also does not provide evidence showing how "fully rebut[ing]" the evidence regarding what his colleagues said about him would have changed Dean Nohria's determination. (Opp. 23.) While the Dean certainly did not ignore the large number of negative votes cast by the Appointments Committee (the record contains no evidence that any candidate has ever been tenured with this many negative votes), the decision was ultimately Dean Nohria's alone; that the Appointments Committee vote was below 60% in favor of Plaintiff (SF ¶103) was not the determining variable. Given Dean Nohria's express concerns with Plaintiff's outside activities, Plaintiff cannot offer any evidence to show that, had the vote been greater than 60% favorable, Dean Nohria's decision would have changed. Plaintiff has failed to meet his burden to show harm; summary judgment should therefore be granted in Harvard's favor on his breach of contract claim.

C. The Undisputed Facts Establish That There Was No Violation of Good Faith or Fair Dealing

Plaintiff's Opposition does not provide a genuine dispute as to his claim for breach of the duty of good faith and fair dealing. Rather, Plaintiff distorts the facts in an attempt to paint Deans Crispi and Cunningham as individuals who were so conflicted by both their roles on the FRB and their personal biases they were motivated to fabricate evidence and manipulate the FRB process. Similarly, as to his other allegations regarding the FRB's purported violations of the duty, Plaintiff reads into the FRB Principles requirements that are not supported by the text or the evidence.

Plaintiff claims that Deans Crispi and Cunningham "acted as both witnesses and adjudicators" (Opp. 24) because they were "personally involved in incidents the FRB reviewed" (Opp. 2). This assertion relies on the assumption that members of a panel convened to review

"concerns about conduct" (Ex. 18 at JA-368) cannot be personally involved in the matters they are reviewing, but the FRB Principles guarantee no such scenario, nor does Plaintiff cite any legal authority to support this claim. Indeed, Dean Nohria knew well both Dean Crispi's role as head of staff at HBS and Dean Cunningham's role in the Dean's Office—roles that positioned both women to interact directly with or receive concerns about Plaintiff—and was not concerned about their ability to fairly adjudicate their FRB duties. (Ex. 8 at 57:24-58:9, 62:2-14.) Plaintiff's focus on what he deems "suppressed evidence"—citing to the projector issue reviewed by the 2015 Report—also misses the mark. (Opp. 3-4.) The 2015 FRB did not suppress evidence of the projectors; rather, its focus was less about whether Plaintiff's concerns about screen size were "valid[]" and more about Plaintiff's ability to move through proper "internal processes" and maintain "respect for colleagues" while doing so. (Ex. 24.) Plaintiff's concern demonstrates yet again that he still does not understand that the FRB focus was his judgment, despite its clear framing that his behavior "did not meet the criteria for 'Effective Contributions to the HBS Community' because he did not demonstrate respect for others or for their commitment to the School." (Ex. 14 at JA-284.)

Further, the evidence Plaintiff cites in support of his assertion that Dean Crispi "fabricated or suppressed evidence" during the FRB's 2017 review (Opp. 24) is itself misleadingly characterized or outright contradicted. Plaintiff points to the notes Dean Crispi brought to an FRB meeting about information she had gathered from her staff reports that included, among other things, references to Plaintiff's involvement with certain HBS faculty members' disabilities (Cross Motion SF ¶26). Plaintiff claims she never shared this document with him (*id.*) and therefore must have "suppressed" it (Opp. 24.) But the 2017 Report does not criticize Plaintiff for his efforts related to disability accommodations for faculty. (Ex. 26.) As to Plaintiff's claims that Dean

Crispi "fabricated" evidence, this is itself a fabrication. Plaintiff focuses on two bullet points in the 2017 Report's section on faculty and staff interactions which were added by Dean Crispi during the drafting process and claims the language used in these bullet points was not in her July/August 2017 interview notes. (Cross Motion SF ¶49.) But Plaintiff ignores the fact that this language came from feedback she received as part of her information-gathering process as an FRB member. (Exs. 50; 161.)[4] There was no fabrication of evidence by her or anyone else on the FRB.

Plaintiff fails to demonstrate that any personal views Deans Crispi and Cunningham may have had about him hindered their ability to fairly perform their duties with the FRB. Rather, the evidence cited by Plaintiff either does not show bias at all or merely demonstrates that both Deans had personal experiences with Plaintiff, and those experiences led to frustration with his behavior or concerns about his actions were he to receive tenure—the very topic the FRB was tasked with reviewing. (Opp. 24 and Ex. 187, 106-107; Ex. 6, 165-166, 172-173.) Plaintiff cites *Barry v. Trs. of Emmanuel Coll.*, 2019 WL 499774 (D. Mass. Feb. 8, 2019), and attempts to distinguish *Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, cited by Harvard in its Memorandum, arguing that Deans Crispi and Cunningham were not "academic adversaries" of Plaintiff. (Opp. at 24; Mem. at 23.) Not only did the *Barry* case also involve academic adversaries, the facts there demonstrated that a professor reviewing the plaintiff's tenure application had such an adversarial past with plaintiff that the court took note of the fact he did not recuse himself from

[4] Compare Ex. 26 at JA-420 ("He leaves a lot of unproductive work for people since he jumps to solutioning without thinking through implications or engaging others," and "He goes off on tangents or down rabbit holes, and he doesn't know as much as he thinks he knows.") with Ex. 50 at JA-547, JA-550-51) ("Leaves a lot of work for people doing things"; "Takes them in an unproductive path and then people tune you out"; "Doesn't know as much as he thinks he knows"; "Goes off on tangents") and Ex. 161 ("he jumps into situations and introduces much chaos"; "I have several other examples where Ben [Edelman] is jumping down rabbit holes and leaving a large wake of expended energy in IT and beyond").

the tenure process, even when another professor who was similarly adversarial to plaintiff had done so. *Barry*, 2019 WL 499774, *7-8. That is far from the situation here. (*Supra* at 8.)

Plaintiff's other claimed violations of the duty are similarly without merit, and do not demonstrate a genuine dispute. Claims that the FRB misstated evidence and did not correct "errors" in the report (Opp. 25) are belied by the fact that Plaintiff himself was able to (and did) respond to any such errors in his Reply, which became part of the factual record available to the Standing and Appointments Committees and Dean Nohria. (Mem. 9.) Plaintiff's claims that the 2017 Report "over-represented negative remarks" and were "impossible to rebut" (Opp. 25) ignore the fact that the 2017 Report itself describes nearly twice as many positive as negative comments, and likewise ignore the fact that Edelman did directly challenge the negative opinions some colleagues expressed about him. (Ex. 26 at JA-451.) And Plaintiff's purported "evidence" offers no support that any FRB member made up their mind before the 2017 FRB process began. (Opp. 25; *see* Ex. 1, 39:23-40:5, 214:11-215:6; Ex. 2, 39:7-41:4, 118:22-119:24, 121:20-122:20, 123:6-125:16; Ex. 4, 81:20-82:19; Ex. 58 at JA-609.) The fact that FRB members responded at times negatively to things Edelman said during the FRB's review is not evidence of bias, but evidence that Edelman's own efforts to justify his conduct raised questions about whether he should be tenured. In short, Plaintiff has not demonstrated a genuine issue of material fact, and Harvard's motion for summary judgment on his claim for breach of the duty of good faith and fair dealing should be granted in its favor.

CONCLUSION

For these reasons, and those set forth in its Memorandum in Support of Its Motion for Summary Judgment, Defendant respectfully requests that this Court enter summary judgment in its favor on all counts and grant any other relief as is just and proper in the circumstances.

CERTIFICATE OF SERVICE

I, Martin F. Murphy, hereby certify that I have caused a true and correct copy of the foregoing document to be served on counsel of record for Plaintiff by email on December 19, 2025.

/s/ Martin F. Murphy
Martin F. Murphy