

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

CONSOLIDATED STATEMENT OF UNDISPUTED FACTS
FOR DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby responds to the Defendant's Statement of Undisputed Facts as follows,
pursuant to Mass. R. Civ. P. 56 and Superior Court Rule 9A(b)(5)(iii)(A).¹

1. All policies and procedures at Harvard Business School are developed to create a process that leads to recommendations to the Dean; in almost all matters, the Dean has discretion to amend the process as the Dean sees fit because in almost all cases the ultimate decision rests with him. Ex. 8, 16:16-22.

Plaintiff's Response: Disputed. Whether the Dean has discretion to amend a given policy or procedure is a question of law (addressed at 10-11 in Plaintiff's Opposition to Defendant's Motion for Summary Judgment). The Principles and Procedures for Responding to Matters of Faculty Conduct at issue in this case do not give the Dean authority to unilaterally amend or depart from the procedures. (Ex. 18.)

¹ Plaintiff understands that references to "BE" in Defendant's Statement of Undisputed Facts are to Plaintiff Benjamin Edelman, and responds based on that understanding.

2. From March 2015 to June 30, 2018, the “Green Book,” known formally as Policies and Procedures with Respect to Faculty Appointment and Promotions (Ex. 13), was in effect at Harvard Business School (“HBS”).

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

3. The entire responsibility to make a recommendation to Harvard’s President whether an HBS professor should be granted tenure is assigned to the Dean. Ex. 8, 24:7-15; Ex. 3, 135:6-7.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

4. Tenure candidates are not permitted to view the external and internal letters gathered as part of the promotion process. Ex. 1, 106:18-107:4; Ex. 29.

Plaintiff’s Response: Disputed. If such letters, or parts of such letters, are gathered as evidence by a Faculty Review Board, then they must be shared with the faculty member whose conduct is under review. (Ex. 18.)

5. The Principles and Procedures for Responding to Matters of Faculty Conduct (“the FRB Principles”) (Ex. 12) were drafted by a small committee and later presented to the faculty. Ex. 12.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

6. HBS adopted the FRB Principles in April 2015. Ex. 12. The FRB Principles remained in effect through June 30, 2018.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

7. The FRB Principles were not posted on the internal site where other school policies are made available for faculty to review and download at will. Ex. 3, 176:15-177:6.

Plaintiff’s Response: Disputed in part as unsupported by the evidence cited. Plaintiff does not dispute for purposes of Defendant’s Motion for Summary Judgment that the FRB Principles were not available on the myHBS website in the policy section at the time when Plaintiff looked for

them there.

8. In May 2015, the HBS added a Standing Committee—a committee composed of the members of a candidate’s subcommittee and the members of subcommittees considering other candidates that year—to the tenure promotion process. Ex. 57.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

9. The FRB Principles’ reference to the Standing Committee refers to the Standing Committee of Practice Faculty, as the “tenure” Standing Committee did not exist when the FRB Principles were issued. Ex. 5, 18:3-10; Exs. 13; 18.

Plaintiff’s Response: Disputed. The FRB Principles do not reference the Standing Committee of Practice Faculty. (Ex. 18; *see also* Exhibits 57; 170-175; 5 at 14-15, 17; 10 at 15-17; 9 at 16-17; 11 at 15.)

10. The tenure Standing Committee, unlike the Standing Committee of Practice Faculty, does not prepare a report and recommendation, it merely provides a summary of its deliberations and its final vote. Ex. 183, ¶9.

Plaintiff’s Response: Disputed. The Standing Committee’s “Addendum” is essentially a report. (Ex. 67; *see also* Ex. 5 at 22-26 (describing the work of the Standing Committee for Management and Practice Faculty and stating that the Standing Committee for Management and Practice Faculty does not prepare a report, only a Subcommittee of that Committee does).)

11. On January 28, 2014, Plaintiff published a blog post about a UK company called Blinkx alleging that the company had engaged in deceptive advertising practices. The blog post was based on research that two investment firms paid him \$10,000 to conduct. Ex. 177, Response No. 4. The blog post caused, in Plaintiff’s own words, “a firestorm.” Ex. 54; Ex. 3, 277:24–278:2.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

12. The Blinkx stock price fell dramatically soon after the blog posted, and HBS began to field media questions about Plaintiff's potential conflict of interest as a paid researcher for short-selling investment firms that stood to benefit from his blog post. Ex. 14, at JA-703; *see, e.g.*, Ex. 55.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

13. In days following BE's publication of the Blinkx blog post, the controversy surrounding the blog post increased, resulting in adverse publicity to HBS and creating what Plaintiff called a "firestorm." Ex. 3, 288:6-9; 19:10-12; 277:21-278:1.

Plaintiff's Response: Disputed in part. Plaintiff's reference to a "firestorm" was to the controversy that the blog post occasioned and not to adverse publicity to HBS. Ex. 3, 277-278.

14. On December 9, 2014, boston.com posted a story headlined Ben Edelman, Harvard Business School Professor, Goes to War Over \$4 Worth of Chinese Food. Ex. 3, 261:19-21. Ex. 14, at JA-758.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

15. A prominent legal commenter tweeted in response to the boston.com article, "Here is why people hate (a) @Harvard and (b) lawyers." Ex. 3, 262:23-263:1.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

16. Dean Nohria believes he has never received more emails as Dean about a faculty member than he did about the Boston.com story describing Plaintiff's interactions with Sichuan Garden, describing it as a "tsunami." Ex. 8, 37:13-23.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

17. One alumnus wrote the following to Dean Nohria:

If it isn't obvious, this type of behavior is truly embarrassing for me, as an alumnus and as someone who is proud of Harvard Business School . . . this type of behavior is damaging nationally. Worse, the faculty member in question is now on the record defending his actions, rather than apologizing. It likely goes without saying, but as

a faculty member, Ben Edelman represents both the school, and to an extent, the alumni who attended the school . . . This behavior is bullying, masked in a thin guise of pseudo-legal rhetoric. I shudder to think at his behavior under the secure protection of tenure. Ex. 144.

Plaintiff's Response: Not disputed for purposes of summary judgment that the alumnus wrote this text; Plaintiff does dispute the accuracy of its description of events.

18. One HBS student launched a fundraiser to help fight hunger to offset the “negative stereotypes” of HBS reinforced by “an HBS’s professor’s disrespectful treatment of a local business owner over a discrepancy of \$4 for Chinese” food. Ex. 14, at JA-769–70.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

19. The Sichuan Garden controversy resulted in adverse publicity to HBS. Ex. 3, 19:10-12.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

20. Plaintiff testified that the Blinkx and Sichuan Garden incidents were ‘two high watermarks in the school of negative publicity.’ Ex. 3, 82:4-6.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

21. In Dean Nohria’s view, the Blinkx and Sichuan Garden incidents “led to real question marks about whether [Plaintiff] was a person who could meet [HBS’] community standards . . .” Ex. 8, 163:16-18.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

22. Plaintiff acknowledges that, following the Blinkx and Sichuan incidents, HBS’s leaders “had legitimate reason to be concerned about whether [BE] was capable of exercising good judgment.” Ex. 3, 19:22-20:1.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

23. Plaintiff acknowledged that HBS’s leaders “were right to be thinking about whether it could happen again.” Ex. 3, 82:15-16.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

24. Plaintiff first sought tenure at HBS in 2015. Ex. 14, at JA-713; *see also* Ex. 3, 129:13-15.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

25. On July 16, 2015, Senior Associate Dean for Faculty Development Paul Healy, who had day-to-day responsibility for the faculty promotion process, reminded Plaintiff that the Green Book's standard for promotion to tenured professor required a candidate to meet HBS's standard for Effective Contributions to the HBS Community and informed Plaintiff that "concerns" about his conduct and his ability to meet this requirement and that Senior Associate Dean Healy had therefore "referred this aspect of your case to the Faculty Review Board." Ex. 14, at JA-713; Ex. 3, 151:12-14.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

26. Senior Associate Dean Healy's July 16, 2015 letter contained an electronic link to the FRB Principles (Ex. 14, at JA-713; Ex. 3, 151:16-152:21) but Plaintiff does not remember "one way or the other" reading the document linked to Senior Associate Dean Healy's email. Ex. 3, 155:9-11.

Plaintiff's Response: Disputed in part. The letter linked to the P&P, which Plaintiff read carefully when it was sent to him previously. Ex. 3 at 175.

27. Plaintiff does not think he looked at the FRB Principles between when the 2015 FRB proceedings were initiated and the time the FRB issued its final report in 2017, despite acknowledging that he began thinking about suing Harvard as early as 2015. Ex. 3, 26:7-11; 175:20-176:5.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

28. On July 31, 2015, FRB Chair Professor Amy Edmondson sent Plaintiff a letter concerning the FRB's 2015 review. Ex. 3, 157:17-20; Ex. 14, at JA-714.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

29. Professor Edmondson's "provide[d] a summary of the scope of [the] review":

The FRB will consider two incidents that occurred during 2014: the first, in January, involving your blog posting about Blinkx, and the second, in December, relating to your interaction with Sichuan Garden. These incidents raised questions about your conduct, including the impact of your actions on HBS, the members of its community, and others. In addition, concerns have been raised about your interactions with staff and other colleagues at the School, including around case copyright, travel arrangements, business cards, and classroom projectors. Over the coming weeks we will review documents and conduct interviews to evaluate these incidents and interactions, and others that may come to our attention over the course of the review. (Ex. 14, at JA-714.)

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that the document contains the quoted language.

30. Plaintiff thought that the letter complied with the FRB Principles and that it was "clear enough." Ex. 3, 158:6-8; 159:4-6.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

31. In 2015, as part of its work, the FRB conducted interviews and gathered documents. Ex. 3, 160:19-161:1. Ex. 14, at JA-702.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

32. The FRB's 2015 report did not "include the identities of the individuals interviewed" or "provide interview notes." Ex. 3, 161:10-17. Plaintiff did not get the identity of the witnesses or the interview reports. Ex. 3, 163:17-21. Plaintiff did not complain that the 2015 FRB report did not disclose the identities of the individuals interviewed or provide interview notes. Ex. 3, 161:10-17.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

33. The FRB issued its draft report to Plaintiff in October 2015. Ex. 14.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

34. Plaintiff was given an opportunity to respond in writing, which he did on November 6, 2015. Ex. 115; 116.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

35. The 2015 FRB Report and its Exhibits are at Ex. 14; Plaintiff's Reply is at Ex. 116.

Plaintiff's Response: Plaintiff does not understand this to be an assertion of fact. To the extent that it is an assertion of the authenticity of these documents, not disputed for purposes of Defendant's Motion for Summary Judgment.

36. The FRB's 2015 Report concluded that:

In examining all three areas-Blinkx, Sichuan Garden, staff interactions-the FRB finds that Professor Edelman did not uphold the School's Community Values, and his conduct in each instance did not meet the criteria for "Effective Contributions to the HBS Community." In his dealings with Sichuan Garden and with staff at HBS, he did not demonstrate respect for others or for their commitment to the School. His tone was overly harsh, his approach was dogged, and he demonstrated a lack of appreciation for a difference of views. In connection with Blinkx, he failed to recognize that as a faculty, integrity in our activities-both real and perceived-is at the core of what we do. Across all three areas, his actions reflected a repeated inability to understand and adopt not just the technical requirements of the School's policies, values, and standards, but the underlying principles they convey. Professor Edelman has consistently exhibited a tendency toward absolutism and extreme certainty that his view is the right view. His apparent certainty that his is the single right perspective, without regard for others' perspectives, was evident in his written and oral response to the committee and was mentioned (although not always as a weakness) by senior colleagues. We do not see persuasive evidence of accountability for personal behavior that would reflect evidence of learning. Although Professor Edelman might argue that his work is in fact "making a difference in the world" and is consistent with the School's mission, we would suggest that how he goes about his work matters and is essential to our Community Values. Ex. 14, at JA-707.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that the document contains the quoted language.

37. The 2015 FRB's Report also stated:

In terms of managing his outside activities, the FRB found that Professor Edelman did not appear to understand that his own zeal for righting a wrong could call into question the integrity of his writings, as well as the integrity of faculty work more

broadly and the reputation of the School-that a single- minded focus on redressing one wrong could, nonetheless, enable other wrongs to occur. In addition, Professor Edelman did not seem to understand that conflicts of interest, real or perceived, could arise not only when he had been paid directly by a company for his work, but as a result of past work for clients in the same industry or field. Ex. 14, at JA-709; Ex. 3, 255:17-256:8.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that the document contains the quoted language.

38. Plaintiff believes the 2015 Report should have been "guided by the evidence to a greater extent than they were[,] especially when they received the additional evidence in my reply." Ex. 3, 48:3-7.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

39. Plaintiff raised no concerns to HBS leadership about how the 2015 FRB was conducted. Ex. 3, 48:18-49:16.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

40. Plaintiff has raised no claim in this Court concerning how the 2015 FRB was conducted. Dkt. No. 9 at 8.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

41. In 2015, the HBS Standing Committee considered Plaintiff's tenure case and the FRB's 2015 Report was submitted to the Standing Committee. Ex. 3, 24:4-6; 171:1-3. Plaintiff did not complain about the Standing Committee considering the FRB's 2015 Report. Ex. 3, 171:1-5.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

42. The Standing Committee recommended that the Dean offer Plaintiff a two-year extension as a junior faculty member. Ex. 3, 24:15-25:24; see also Ex. 45.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

43. On Nov. 12, 2015, Senior Associate Dean Healy spoke by telephone with Plaintiff. Ex. 3,

25:17-26:4. Ex. 45 contains Plaintiff's contemporaneous notes of that conversation. Ex. 3, 25:21-24.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

44. Senior Associate Dean Healy told Plaintiff that the Standing Committee focused principally on Blinkx and Sichuan Garden. Ex. 45.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

45. Plaintiff's contemporaneous notes of his November 12, 2015 conversation with Senior Associate Dean Healy describe the following message conveyed from Dean Nohria: "no guarantees here" and "committees where [I] am engaged with people outside my unit, able to demonstrate to them that [I] have seen the message [and] learned the lessons." Ex. 45.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that the document contains the quoted language.

46. Following the extension, by the end of 2017, Plaintiff "had to affirmatively prove" that he could meet community standards to receive tenure. Ex. 8, 163:18-19.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

47. Plaintiff understood at the time that "the burden on the candidate is to establish the case for promotion." Ex. 3, 28:23-24.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

48. After discussing Plaintiff's extension with Senior Associate Dean Healy and Dean Nohria, the FRB wrote to Dean Nohria and Senior Associate Dean Healy on November 25, 2015 "to document [its] understanding of the case and its future steps." Ex. 143.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

49. The FRB said, among other things:

In our review of all of the available materials related to the case, we unanimously concluded that there was a lack of sufficient evidence that Ben had internalized the lessons from the Blinkx and Sichuan Garden events. We also concluded that we lacked compelling evidence that Ben understood the nature of the concerns about his interactions with staff, especially about his interactions with the staff, especially related to his tone and respect for other points of view. We hope that the extension will give him time to generate this evidence. We anticipate that we, or our successors on the FRB, will need to write a second report in the summer or fall of 2017, covering the new evidence on these matters, and including a new recommendation. We want to emphasize that for Ben to ‘stay out of trouble; over the next two years will not be sufficient to put our concerns to rest. We lack confidence that he understands his responsibilities as a faculty member of personal and institutional integrity; independent, objective and ethical scholarship; accountability for actions and conduct; and preservation of the School’s standing of an institution of public trust. Ex. 143, at JA-550.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment that the document contains the quoted language.

50. Dean Nohria and the FRB anticipated in 2015 that the FRB would review Plaintiff’s case in 2017. Ex. 8, 90:4-16.

Plaintiff’s Response: Disputed. (Exs. 8 at 91-92; 5 at 88-90; both expressing doubt whether Plaintiff was told in 2015 that the FRB would review Plaintiff in 2017.)

51. Plaintiff’s extension would not have been granted without this anticipation. Ex. 8, 90:8-10.

Plaintiff’s Response: Disputed based on the response to the previous paragraph, and disputed as an improper hypothetical and speculation, rather than an assertion of fact.

52. Plaintiff met with Dean Nohria to discuss his extension in January 2016. Ex. 46.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

53. On January 24, 2017, Senior Associate Dean Healy emailed Plaintiff about his 2017 tenure case. Ex. 3, 218:22-219:6; Ex. 51. Senior Associate Dean Healy’s email included the following language: “I also checked with Rae [Mucciarone, HBS Assistant Director, Faculty Recruiting and Appointments] and she thinks we should make the deadline for handing in materials March 15th for everything. So that should give you even more time. *She also liked your idea of listing some*

people the FRB could talk to, so I will formalize that in the letter.” Ex. 3, 218:22-219:6; Ex. 51 (emphasis added).

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

54. Plaintiff’s response to Senior Associate Dean Healy’s email did not take issue with Senior Associate Dean Healy’s statement that it was BE’s idea to “list[] some people the FRB could talk to . . .” Ex. 3, 219:7-16; Ex. 51.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

55. Plaintiff knew no later than January 24, 2017, that “the FRB was going to be doing some interviews in connection with your tenure review.” Ex. 3, 219:17-22.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

56. On March 15, 2017, Plaintiff submitted a document to the FRB entitled “Reflections on Feedback from Faculty Review Board.” Ex. 3, 220:24-221:6; Ex. 26, at JA-891–898.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

57. Plaintiff chose what to include in that submission and was comfortable with the submission that was made; it was not submitted over Plaintiff’s objection. Ex. 3, 220:24; 221:7-22.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

58. The “Reflections” documents included information about Plaintiff’s outside activities between 2015 and 2017. Ex. 3, 222:18-20; Ex. 26, at JA-892-93.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

59. On July 6, 2017, Professor Edmondson wrote to Plaintiff stating, among other things:

In November 2015, the Standing Committee then recommended deferring your case for two years to enable you to demonstrate whether you had indeed internalized lessons learned, anticipating that the FRB would again be activated during summer/fall 2017 to review your conduct. The FRB now must assess: whether you understand the aspects of your conduct--regardless of your intent -- that made them problematic; whether there is sufficient evidence of changed

behavior; and whether there is a reasonable expectation that your changed behavior will be sustained in the future. (Ex. 26, at JA-889.)

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that the document contains the quoted language.

60. When the FRB reconvened in 2017, Plaintiff generally "expected the 2017 FRB to be similar to . . . the 2015 FRB in terms of the methods used, the kinds of information provided at the outset and the kinds of information provided as exhibits or attachments to the reports." Ex. 3, 161:18-162:1.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

61. Professor Stuart Gilson, who joined the FRB in 2017, had no prior relationship with Plaintiff, but concluded after reading Plaintiff's March 2017 submission to the FRB that Plaintiff was "arrogant." Ex. 2, 129:6-17.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

62. The FRB began conducting interviews later in July 2017. Ex. 50.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

63. At the time of the 2017 FRB review, Plaintiff did not have any information about any other FRB that took place between 2015 and 2017 and did not know whether any other FRB subjects received the identity of interviewees or interview notes. Ex. 3, 163:22-164:4.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

64. In fact, no other FRB proceedings between 2015 and June 2018 provided copies of witness statements or notes of interviews to the respondents. Ex. 179.

Plaintiff's Response: Disputed. Ex. 4 at 68-71.

65. The 2017 FRB did not disclose to Plaintiff the identities of the witnesses it interviewed in conjunction with the 2017 FRB or give Plaintiff copies of interview notes. Ex. 7, 140:5-17.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

66. On July 13, 2017, Professor Max Bazerman filed suit against American Airlines in United States District Court in Boston. Ex. 26, at JA-885-7. *See Bazerman v. American Airlines*, 1:17-cv-11297-WGY Ex. 22. The Complaint identified Plaintiff's "Law Offices of Benjamin Edelman" as Professor Bazerman's counsel. Ex. 184.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

67. Plaintiff did not disclose the fact that he was representing another Harvard Business School professor to Dean Nohria, Jean Cunningham, or anyone in the HBS Dean's office before filing it (Ex. 3, 234:12-239:4), and did not consider speaking to either Dean Cunningham or Dean Nohria about filing the suit before doing so. Ex. 3, 239:1-8.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

68. On July 31, 2017, Plaintiff followed up on the FRB's July 6 letter by submitting a response that, among other things, addressed his choice of outside activities, including his decision to file a class action lawsuit against American Airlines. Ex. 26.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

69. The FRB interviewed Plaintiff on August 14, 2017, where he discussed, among other things, the American Airlines suit with the FRB. Ex. 60; Ex. 3, 224:8-9.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

70. With respect to the lawsuit against American Airlines, Plaintiff told the FRB in his 2017 interview that: "I can't sit on my hands when I know about something like this." Ex. 3, 226:22-227:4. Ex. 26, at JA-887

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

71. On July 14, 2017, the Wall Street published an article headlined "Paying Professors: Inside

Google's Academic Influence Campaign." Ex. 3, 246:15-247:13; Ex. 52.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

72. The Wall Street Journal article contained the following sentence: "Microsoft has paid Harvard Business Professor Ben Plaintiff, the author of papers saying Google abuses its market dominance." Ex. 3, 246:15-247:13; Ex. 52.

Plaintiff's Response: Disputed to the extent that the word "Edelman" has been replaced with "Plaintiff." Otherwise not disputed for purposes of Defendant's Motion for Summary Judgment.

73. Between 2006 and 2015, Microsoft paid Plaintiff nearly \$2 million. Ex. 53; Ex. 3, 250:18-251:15.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

74. On August 25, 2017, Senior Associate Dean Healy brought the Wall Street Journal article to the FRB's attention, and asked whether Plaintiff's "papers appropriately acknowledged his relation with Microsoft[.]" Ex. 167.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

75. On September 1, 2017, Professor Edmondson sent Plaintiff an email requesting "for the approximately two years following your initial FRB review: "a complete listing of your outside activities, including client names and litigation" and "a complete listing all work products in the public domain (e.g., articles, reports and presentations)" Ex. 26, at JA-907.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

76. Professor Edmondson also asked Plaintiff to explain more fully his thinking about his outside activities, particularly "when and where to seek advice or approvals on your outside activities, and when and how to include disclosures on your output." Ex. 26, at JA-907.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

77. Plaintiff did not inform the FRB of any objection to the FRB's September 1, 2017, request nor did he ask for more time (Ex. 3, 95:21-96:12), and on September 8, 2017 provided the FRB with a single-page list of his outside activities between October 1, 2015 through September 8, 2017 (Ex. 147, at 564), a "Supplemental Response to Faculty Review Board Questions: Outside Activities" (Ex. 26, at 908-913) that was more than five single-spaced pages, and a full listing of his recent work products (Ex. 147, at JA-561).

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

78. The FRB issued its draft 2017 Report in September 2017. Ex. 150.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

79. Plaintiff responded to the 2017 Report on October 5. Ex. 26 at JA-914.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

80. On October 10, the FRB issued its final 2017 report, which included a list of changes it made to its initial 2017 report following its review of Plaintiff's Reply. Ex. 26 at JA-926.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

81. The report focused on two issues: (1) respect for others inside the institution and (2) outside activities and conflict of interest. Ex. 3, 89:4-9; Ex. 26 at JA-881.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

82. With respect of outside activities and conflict of interest, the report focused on two specific issues: BE's disclosures concerning Google and Microsoft and the American Airlines suit. Ex. 3, 89:10-15; Ex. 26 at JA-884.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

83. With respect to those two issues, Plaintiff has acknowledged that the 2017 FRB disclosed the evidence on which it relied relating to the disclosures, including the American Airlines lawsuit.

Ex. 3, 89:16-23.

Plaintiff's Response: Disputed that the FRB actually disclosed the evidence on which it relied relating to the disclosures and the American Airlines lawsuit. Exs. 61-64; 4 at 115-122.

84. With respect to American Airlines, the FRB expressed concern that, “given his prior history with situations that had complicated consequences for him and for the School[,]” Plaintiff “did not engage” the Dean, the Dean’s Office or HBS’s Director of Communications filing suit, which “gave us continuing reason to be concerned that Professor Edelman can be quick to act on his perceptions of wrongdoing by others, without first reaching out to understand different points of view.” Ex. 26 at JA-888.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment that these are accurate quotations from the FRB’s report.

85. With respect to Microsoft, the FRB found: “Professor Edelman’s reporting of disclosures is, at best, inconsistent . . . We would suggest that rather than providing information so that a reader might determine potential conflict, Professor Edelman instead omits many of the required elements, and himself seeks to make that determination.” Further, “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 its 2015 Report] about ‘the public’s trust in the independent and objective nature of [his] scholarship.’” Ex. 26 at JA-885.

Plaintiff's Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment that these are accurate quotations from the FRB’s report.

86. The FRB 2017 Report concluded that the FRB was “unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved” or that Plaintiff met “the School’s standards for collegueship.” Ex. 26 at JA-888.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that this accurately quotes the FRB's report.

87. The FRB's 2017 report accurately described the disclosures Plaintiff made in the publications and presentations listed on pages six and seven of its report. Ex. 3, 252:20-255:8; Ex. 26 at JA-884-85.

Plaintiff's Response: Disputed. Ex. 182 at ¶¶ 14-22.

88. Plaintiff's response to the FRB's 2017 Report did not contend the FRB's descriptions of the disclosures in the six publications or presentations listed in the bullet points on pages six and seven of its report were incorrect. Ex. 3, 252:20-255:8; Ex. 26 at JA-884-85; 914-15.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

89. Plaintiff did not think about the statement in the FRB's 2015 Report concerning conflicts of interest, real or perceived, arising from his past work, see Ex. 14 at 707-08, when he drafted the disclosures in the six publications or presentations listed in the bullet points on pages six and seven of its report. Ex. 3, 256:11-17.

Plaintiff's Response: Disputed that pages six and seven of the FRB report accurately describe the disclosures, as referenced in the response to paragraph 87. Otherwise not disputed for purposes of Defendant's Motion for Summary Judgment.

90. Plaintiff has acknowledged that, in evaluating his candidacy for tenure in 2017 the Appointments Committee and the Dean were entitled to evaluate the quality of his judgment on issues of conflict of interest. Ex. 3, 258:16-21.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

91. On the subject of respect for others inside the institution, the 2017 report contains 27 bullet points that contain favorable information about Plaintiff and 13 bullet points that contain negative

information. Ex. 3, 96:13-97:10.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

92. Neither the negative nor positive bullet points contain attribution. Ex. 3, 97:11-13.

Plaintiff's Response: Disputed in part; some positive bullet points are attributed to members of Plaintiff's unit. (Ex. 26, 3-4.)

93. In 2017, the FRB interviewed a number of individuals who made negative comments about Plaintiff that were not included in the 2017 FRB Report. Ex. 3, 200:6-9, 218: 6-9.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

94. A staff member at HBS told Dean Crispi that Plaintiff "comes across as arrogant," sends "long emails, inappropriate" and "absorbs meetings." Ex. 3, 201:17-18; Ex. 50 at JA-626. The FRB did not include these negative comments in the 2017 FRB report. Ex. 3, 201:17-202:1.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that these phrases appear in Dean Crispi's notes and do not appear in the 2017 FRB report.

95. According to Professor Gilson's interview notes of an HBS professor, the professor said that Plaintiff is "unable to restrain himself"; that he "comes from a good place, but [has] no sense of what's appropriate" [and] "is unable to see [the] other side's point of view (contrary to HBS where the case method is based upon finding common ground, trying to understand the perspective of those who disagree with you." Ex. 3, 210:24-211:17; Ex. 50 at JA-460. The FRB did not include these negative comments in the 2017 FRB report. Ex. 3, 211:16-17.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

96. According to Professor Gilson's notes of his interview with another HBS professor, this professor asked, referring to Plaintiff, "Is he a Ted Kaczynski or a John Nash?". Ex. 3, 216:15-17; Ex. 50 at JA-465. The FRB did not include that comment in its 2017 Report. Ex. 3, 217:3-7.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

97. According to Professor Gilson's notes of an HBS Senior Lecturer in the Organizational Behavior Unit, the Senior Lecturer said: "I have my doubts about [Edelman's] ability to resolve his behavioral issues." Ex. 3, 217:17-22; Ex. 50 at JA-481-82. The FRB did not include that comment, which Plaintiff acknowledges was negative, in its 2017 Report. Ex. 3, 217:17-22.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

98. On November 7, 2017, Plaintiff wrote Professor Kathleen McGinn and said: "I don't think I have the 'principles and procedures' document. . . . There may be principles I've failed to cite or rely on, not to mention procedures, to my detriment." Ex. 123 at JA-832.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

99. Plaintiff's best recollection is that he did not look at the FRB Principles during the 2017 FRB proceedings before November 7, 2017. Ex. 3, 175:24-176:14.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

100. On October 17, 2017, the Standing Committee met to discuss and vote on Plaintiff's tenure case. Ex. 67.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

101. After speaking with a member of the FRB and of Plaintiff's unit, the Standing Committee discussed internally Plaintiff's behavior, collegueship, and the implications for the school. Ex. 67. The Standing Committee voted at the end of the discussion whether to recommend Plaintiff for promotion, with fifty percent of the committee voting in favor, and fifty percent against. Ex. 67.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

102. Plaintiff spoke with a member of the Appointments Committee on November 16, 2017—

after the Appointments Committee met to consider Plaintiff's tenure case earlier that day. Ex. 3, 139:15-16, 141:6-22; Ex. 8, 78:14-18.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

103. Plaintiff received favorable votes from 41 members of the Appointments Committee (reflecting 57% of the Appointments Committee) and negative votes from 29 members of the Appointments Committee (reflecting 42% of the Appointments Committee); there were two abstentions. Ex. 109.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

104. On November 27, 2017, at Dean Nohria's request, Senior Associate Dean Healy sent Dean Nohria a summary of votes for promotion cases from 2006-2017. Ex. 110; Ex. 8, 27:16-19. The data showed that for tenure cases during those years, where faculty members received fewer than 65% favorable votes from the Appointments Committee, none received tenure (of six cases). Ex. 110.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

105. Dean Nohria viewed the faculty vote as "not a clear mandate in either direction" because, in his view, any vote that isn't "85% or 95 favorable is not a clear mandate." Ex. 8, 149:10-13; Ex. 110. The vote in Plaintiff's case was "in the category of no clear mandate where [he had] to exercise his best judgment." Ex. 8, 149:16-18.

Plaintiff's Response: Disputed. Exs. 17; 8 at 152.

106. Dean Nohria decided to recommend to President Faust against Plaintiff being promoted to full professor in 2017 because Dean Nohria had "concluded that [Edelman] had not met our standards for being a member of our community that we could have faith would meet collegiality standards and community standards over the long run." Ex. 8, 136:6-18; 78:19-21.

Plaintiff's Response: Disputed in part. Exs 17; 8 at 152.

107. Dean Nohria reached that conclusion because, in Dean Nohria's view, Plaintiff "continued to have blind spots in relationship to how others might see situations that he would see differently; that on issue where it would have been very easy to check in with someone else, he would personally make determinations for when it was correct for him to check in and when it was not; and that he continued to be excessively self-confident about his opinion relative to consulting others and paying careful attention to what their views might be, which is the heart of what our community encourages in our classrooms and encourages of each other." Ex. 8, 136:22-137:10.

Plaintiff's Response: Not disputed that Dean Nohria made the quoted statement in his deposition.

Disputed that it is a full or accurate account of his reasoning. Exs. 179 (No. 6); 17; 8 at 152.

108. Dean Nohria specifically had in mind:

Several things that go all the way back to the Chinese restaurant situation, where it was very clear that other people thought he was bullying someone and he didn't think -- he couldn't imagine why anybody would believe that, that some people may have thought that if he had any economic relationship with someone who had done a study, he couldn't imagine that if he just published the study because he thought it represented his academic integrity that someone else might imagine that it didn't, that if he took on a lawsuit that he didn't think that it would be worth just talking to someone to see if that was an okay thing, whether that might end up dragging him into a situation in which the amount of work involved or effort involved would create challenges or whether it would create any reputation issues. These are just things where you don't have to say whether you should do it or not, but just having the ability to talk to someone to get a second opinion, to listen to that opinion carefully, to weigh those matters would allow you to make better decisions and he repeatedly seemed to not want to do that. Ex. 8, 137:14-138:14.

Plaintiff's Response: Not disputed that Dean Nohria made the quoted statement in his deposition.

Disputed that it is a full or accurate account of his reasoning. Exs. 179 (No. 6); 17; 8 at 152.

109. Dean Nohria was specifically focused on the American Airlines lawsuit when he made these statements. Ex. 8, 138:15-17.

Plaintiff's Response: Disputed. Ex. 8 at 137-138.

110. In Dean Nohria's view, these concerns about Plaintiff's judgment—independent about his concerns about his relationships with subordinates expressed in the FRB's 2017 Report—were sufficient to cause him to recommend against tenure. Ex. 183, ¶13.

Plaintiff's Response: Disputed. Exs. 179 (No. 6); 17; 8 at 152. In connection with the American Airlines, Dean Nohria did not conclude that Plaintiff had engaged in misconduct; as, Dean Nohria described it:

[T]he conclusion that I arrived at was that the advice that we had given to Ben at the end of 2014 is that relying on his own views of situations was not something that he should count upon because, repeatedly, his own interpretation of those situations had gotten him and the school into places that we would not wish for. He acknowledged that himself. He said, "I've learned from the situation. In the future, I will reach out to people. I will try and learn what someone else's point of view would be. I will consult with people." I remember distinctly him making those promises to me, and by the end of this period, I was -- by 2017, couldn't feel confident that he had fully internalized what he said he was going to internalize. Ex. 8, 139:10-140:4.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

111. In Dean Nohria's view:

[T]he American Airlines case was clearly an example where he could have easily checked in with people. Having been advised about inconsistent disclosures on the Blinkx circumstance, the disclosures that were brought to Microsoft and Google are, again, places where he could have easily erred on the side of caution and on the side of being more disclosing rather than not. So . . . while there were places where he showed signs of improvement, there still remained many places where it would have been easy for him to continue to consult, benefit from others' point of view, that he just for whatever certain reasons continued to not think it was appropriate to do. And those situations would create, to my mind, risk for the institution that as a tenured faculty member where you get permanent employment, and it's very difficult at that point to check or monitor your behavior, those would create undue risk for the institution, which it was my job as dean to protect as much as my job was to promote faculty members who we would celebrate. Ex. 8, 140:7-141:7.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that Dean Nohria expressed this view at his deposition.

112. In Dean Nohria's view, if the HBS Appointments Committee was unanimously in favor of

a candidate, it would be appropriate for the Dean to reject the candidate for promotion if in the Dean's best judgment, it was against the interests of the school. Ex. 8, 25:3-12.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment that this was Dean Nohria's response to a speculative hypothetical not applicable to this case.

113. On December 5, 2017, Dean Nohria called Plaintiff to tell him that he would not recommend him for tenure; Ex. 82 contains Plaintiff's contemporaneous notes from that conversation. Ex. 3, 50:15-23.²

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

114. Dean Nohria told Plaintiff in that conversation that Plaintiff had "dug [himself] into a hole from the 2015 incidents" which Plaintiff understood to mean Blinkx and Sichuan Garden." Ex. 3, 52:13-53:11.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

115. Plaintiff "understood [Dean Nohria] to be saying that he judged all of the other matters in both the 2015 and 2017 reports to be kind of inconsequential." Ex. 3, 53:8-16.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment.

116. HBS appointment's standards "are not anything other than here are three standards that you have to meet to gain the privilege of a lifetime employment at Harvard Business School with very little oversight or discretion, very little oversight that we exercise thereafter. It's a decision in which we always want to be fair to the individual, but it's a very important decision for the institution as well." Ex. 8, 162:16-24.

Plaintiff's Response: Not disputed for purposes of Defendant's Motion for Summary Judgment

² The metadata for this exhibit confirm Plaintiff's notes were taken on December 5, 2017, not September 5 as the transcript indicates.

that Dean Nohria made this statement. Disputed that HBS exercises very little oversight over its faculty. *See* Exs. 18 at 1 & nn.1, 3 (citing and describing numerous policies and guidelines governing the conduct of HBS faculty); 44; 169.

117. On December 31, 2017, Plaintiff told a Harvard Law School Professor he described as “mentor and a friend” that the Sichuan Garden incident probably cost him tenure at HBS. Ex. 3, 125:3-22; Ex. 49.

Plaintiff’s Response: Not disputed for purposes of Defendant’s Motion for Summary Judgment.

Respectfully submitted,
BENJAMIN EDELMAN,
By his attorneys,



Ruth O’Meara Costello (BBO# 667566)
Law Office of Ruth O’Meara-Costello
875 Massachusetts Ave., Suite 31
Cambridge, MA 02139
617-658-4264
ruth@ruthcostellolaw.com

David A. Russcol (BBO# 670768)
Zalkind Duncan & Bernstein LLP
2 Oliver St., Suite 200
Boston, MA 02109
617-742-6020
drusscol@zalkindlaw.com

Dated: December 5, 2025
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