

JOHN MCADAMS,

Plaintiff,

vs.

Case No. 16-CV-003396

MARQUETTE UNIVERSITY,

Defendant.

DECISION AND ORDER FOR SUMMARY JUDGMENT

BACKGROUND

On November 9, 2014, John McAdams, a tenured professor at Marquette University ("Marquette"), which is a private Jesuit University, published a blog post on his personal blog, *Marquette Warrior*, which criticized Chery Abbate, a graduate student and philosophy instructor. In the blog post, Dr. McAdams discussed events surrounding an October 28, 2014, class taught by Ms. Abbate, and he intentionally included her name and a clickable link to her contact information and personal website (<https://ceabbate.wordpress.com/>). The blog post in its entirety is as follows:

A student we know was in a philosophy class ("Theory of Ethics"), and the instructor (one Cheryl Abbate) was attempting to apply a philosophical text to modern political controversies. So far so good.

She listed some issues on the board, and came to "gay rights." She then airily said that "everybody agrees on this, and there is no need to discuss it."

The student, a conservative who disagrees with some of the gay lobby's notions of "gay rights" (such as gay marriage) approached her after class and told her he thought the issue deserved to be discussed. Indeed, he told Abbate that if she dismisses an entire argument because of her personal views, that sets a terrible precedent for the class.

The student argued against gay marriage and gay adoption, and for a while, Abbate made some plausible arguments to the student — pointing out that single people can adopt a child, so why not a gay couple? She even asked the student for research showing that children of gay parents do worse than children of straight, married parents. The student said he would provide it.

So far, this is the sort of argument that ought to happen in academia.

But then things deteriorated.

Certain Opinions Banned

Abbate explained that “some opinions are not appropriate, such as racist opinions, sexist opinions” and then went on to ask “do you know if anyone in your class is homosexual?” And further “don’t you think it would be offensive to them” if some student raised his hand and challenged gay marriage? The point being, apparently that any gay classmates should not be subjected to hearing any disagreement with their presumed policy views.

Then things deteriorated further as the student said that it was his right as an American citizen to make arguments against gay marriage. Abbate replied that “you don’t have a right in this class to make homophobic comments.”

She further said she would “take offense” if the student said that women can’t serve in particular roles. And she added that somebody who is homosexual would experience similar offense if somebody opposed gay marriage in class.

She went on “In this class, homophobic comments, racist comments, will not be tolerated.” She then invited the student to drop the class.

Which the student is doing.

Shutting People Up

Abbate, of course, was just using a tactic typical among liberals now. Opinions with which they disagree are not merely wrong, and are not to be argued against on their merits, but are deemed “offensive” and need to be shut up.

As Charles Krauthammer explained:

The proper word for that attitude is totalitarian. It declares certain controversies over and visits serious consequences — from social ostracism to vocational defenestration — upon those who refuse to be silenced.

The newest closing of the leftist mind is on gay marriage. Just as the science of global warming is settled, so, it seems, are the moral and philosophical merits of gay marriage.

To oppose it is nothing but bigotry, akin to racism. Opponents are to be similarly marginalized and shunned, destroyed personally and professionally.

Of course, only certain groups have the privilege of shutting up debate. Things thought to be “offensive” to gays, blacks, women and so on must be stifled. Further, it’s not considered necessary to actually find out what the group really thinks. “Women” are supposed to feel warred upon when somebody opposes abortion, but in the (sic) real world men and women are equally likely to oppose abortion.

The same is true of Obama’s contraception mandate.

But in the politically correct world of academia, one is supposed to assume that all victim groups think the same way as leftist professors.

The “Offended” Card

Groups not favored by leftist professors, of course, can be freely attacked, and their views (or supposed views) ridiculed. Christians and Muslims are not allowed to be “offended” by pro-gay comments.

(Muslims are a protected victim group in lots of other ways, but not this one.)

And it is a free fire zone where straight white males are concerned.

Student Seeks Redress

The student first complained to the office of the Dean of Arts & Sciences, and talked to an Associate Dean, one Suzanne Foster. Foster sent the student to the Chair of the Philosophy Department, saying that department chairs usually handle such cases. The chair, Nancy Snow, pretty much blew off the issue.

Interestingly, both Snow and Foster have been involved in cases of politically correct attacks on free expression at Marquette.

Foster took offense when one of her colleagues referred to a dinner which happened to involve only female faculty as a “girls night out.” He was reprimanded by then department chair James South for “sexism,” but the reprimand was overturned by Marquette.

Snow, in a class on the “Philosophy of Crime and Punishment” tried to shut up a student who offered a response, from the perspective of police, to Snow’s comments about supposed “racial profiling.” The student said talk about racial profiling makes life hard for cops, since it may make minorities hostile and uncooperative.

Snow tried to silence him, claiming “this is a diverse class.” This was an apparent reference to two black students in the class, who were, Snow assumed, likely offended on hearing that.

The majority of the class, contacted by The Marquette Warrior, felt the comments were reasonable and relevant, but Snow insisted that the student write an apology to the black students.

So how is a student to get vindication from University officials who hold the same intolerant views as Abbate?

Conclusion

Thus the student is dropping the class, and will have to take another Philosophy class in the future.

But this student is rather outspoken and assertive about his beliefs. That puts him among a small minority of Marquette students. How many students, especially in politically correct departments like Philosophy, simply stifle their disagreement, or worse yet get indoctrinated into the views of the instructor, since those are the only ideas allowed, and no alternative views are aired?

Like the rest of academia, Marquette is less and less a real university. And when gay marriage cannot be discussed, certainly not a Catholic university.

Aff. of John McAdams, Ex. A1.

Ms. Abbate started receiving strongly negative emails on the evening of November 9, 2014, and several of the communications expressed violent thoughts about her. On December 16, 2014, Dean Richard Holz advised Dr. McAdams that until further notice he was “relieved of all teaching duties and all other faculty activities,” and that he would still receive his salary and benefits. On January 2, 2015, Dean Holz affirmed that Dr. McAdams was banned from campus. On January 30, 2015, Dean Holz advised Dr. McAdams that his “conduct clearly and substantially fails to meet the standards of personal and professional excellence that generally characterizes University faculties,” and that Marquette was therefore initiating the process to revoke his tenure and terminate his employment.

Pursuant to Marquette's Faculty Statutes on Appointment ("Faculty Statutes"), which are incorporated into Dr. McAdams' employment contract by reference, a Faculty Hearing Committee ("FHC") was assembled to conduct a hearing. The FHC is an independent subcommittee of the Faculty Council that reports to the University President in cases of contested disciplinary action. The FHC was comprised of seven tenured faculty members, was chaired by a law professor, and included a representative from the American Association of University Professors ("AAUP") attending as an observer. Both parties were represented by counsel and multiple witnesses were examined and cross-examined during a four-day hearing, which was conducted from September 21, 2015 to September 24, 2015. On January 18, 2016, the FHC unanimously found "clear and convincing" evidence to support the conclusion that Marquette had "discretionary cause," within the meaning of Section 306.03 of the Faculty Statutes,¹ to impose discipline. Section 306.03 states:

Discretionary cause shall include those circumstances, exclusive of absolute cause, which arise from a faculty member's conduct and which clearly and substantially fail to meet the standard of personal and professional excellence which generally characterizes University faculties, but only if through this conduct a faculty member's value will probably be substantially impaired. Examples of conduct that substantially impair the value or utility of a faculty member are: serious instances of illegal, immoral, dishonorable, irresponsible, or incompetent conduct. In no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action.

See id. While the FHC concluded that the charges against Dr. McAdams were insufficient to revoke his tenure and terminate his employment, it did recommend that he serve a paid suspension for up to two semesters. Consistent with the FHC's recommendation, Marquette University President Michael Lovell imposed a two-semester suspension. President Lovell also demanded, as a condition of his reinstatement, that Dr. McAdams provide a private written statement expressing his "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University." Dr. McAdams refused to issue the apology.

¹ The references throughout this decision to "Section 306" or "Section 307" are to paragraphs in Marquette's Faculty Statutes on Appointment.

On May 2, 2016, Dr. McAdams filed this lawsuit, challenging his suspension and effective termination and alleging the following six causes of action: (1) Breach of Contract – Professor McAdams’ Unlawful Suspension and Banning from Campus from December 16, 2014 through March 31, 2016; (2) Breach of Contract – Marquette Lacks the Necessary Cause to Suspend Professor McAdams without Pay From April 1, 2016 through January 17, 2017 and Marquette’s Suspension Violates Professor McAdams’ Right to Academic Freedom; (3) Breach of Contract – Failure to Renew; (4) Breach of Contract – Marquette Lacks the Necessary Cause to Terminate Professor McAdams and Marquette’s Attempt to Coerce Professor McAdams and Marquette’s Termination of Professor McAdams Violate Professor McAdams’ Contract and His Right to Academic Freedom; (5) Breach of Contract – Marquette Violated Professor McAdams’ Due Process Rights Under the Contract; and (6) Breach of the Implied Covenant of Good Faith and Fair Dealing. *See* Complaint. Cross-motions for summary judgment were filed on December 9, 2016 by both parties. Marquette seeks summary judgment on all six claims, while McAdams seeks summary judgment on claims one, two, and five. A summary judgment hearing was held on February 2, 2017. At the request of the parties the Court granted each party the right to exceed the page limits of Local Rule § 3.15 for the motions and reply briefs, resulting in over 180 pages being filed with hundreds of pages of foreign cited cases attached. This Court failed to stay discovery and pretrial reports, pending summary judgment, until an in-chambers meeting on April 26, 2017, but by then, voluminous motions regarding discovery and the plaintiff’s pretrial report and list of witnesses were filed. The Court only adds this information to explain to the Appellate Court why this case has boxes and boxes of filings, in spite of the fact that the case is being disposed of on summary judgment.

STANDARD OF REVIEW

Summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Wis. Stat. § 802.08(2). The party with the burden of proof at trial has the burden on summary judgment “to show that there are genuine issues of fact that require[] a trial on that claim.” *Milwaukee Area Tech. College v. Frontier Adjusters*, 2008 WI App 76, ¶ 6, 312 Wis. 2d 360, 752 N.W.2d 396. A “material fact is one that is of consequence to the merits of litigation.”

Sherry v. Salvo, 205 Wis. 2d 14, 31, 555 N.W.2d 402, 408 (Ct. App. 1994). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *City of Elkhorn v. 211 Centralia St. Corp.*, 2004 WI App 139, ¶ 18, 275 Wis. 2d 584, 597, 685 N.W.2d 874, 881 (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct.App.1991)).

ANALYSIS

The Court finds that there are no genuine disputes of material fact in this case, and the Court will dispose of this case on summary judgment. See Wis. Stat. § 802.08(2). The subsequent sections contain explanations as to why the Court finds the following: (1) The FHC Report deserves deference; (2) The letter from President Lovell deserves deference; (3) Dr. McAdams was afforded due process that he was entitled to during the FHC hearing; (4) There were no damages for the initial suspension and banishment from campus; (5) Dr. McAdams’ rights to academic freedom and freedom of expression were not violated; (6) Marquette’s decision not to renew and reappoint Dr. McAdams did not breach his contract; and (7) Marquette did not breach the implied covenant of good faith and fair dealing.

I. Deference Regarding the FHC Report

Prior to addressing the merits of Dr. McAdams’ claims, the Court must first address the issue of deference in the context of academic disciplinary decisions. While the Wisconsin appellate courts have yet to address this issue, guidance can be found in two lines of cases. Dr. McAdams relies primarily on *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), and *Roberts v. Columbia College Chicago*, 821 F.3d 855 (7th Cir. 2016), to support the conclusion that deference should not be afforded, whereas Marquette relies on *Yackshaw v. John Carroll Univ. Bd. of Trustees*, 89 Ohio App. 3d 237, 624 N.E.2d 225 (1993), to support the opposite conclusion. For the reasons stated below, this Court is persuaded by the logic of *Yackshaw*.

At issue in *Yackshaw* was whether a tenured professor at a private university had a right to a de novo trial on his breach of contract claim, or whether review was limited to the record of the university’s hearing to terminate his contract. The court found rationale and guidance from

the standard of review adopted by administrative agencies, and concluded that “when the parties’ contract defines the procedure to be used to determine termination of a tenured professor’s contract at a private university, the standard of review is whether the contract and the United States Constitution have been adhered to, and whether there is substantial evidence in the record to support the termination.” *Id.* at 243. The court noted that “[t]he prevailing view, at least on the federal level, is that judicial review should be limited.” *Id.* at 242. The court cited *McConnell* as an “obscure” case that was authored by an appellate court that had been preoccupied, and rightfully so, with the failure of the university to honor the contract. *Id.* The court construed *McConnell* as “creating an exception to the traditional rule of deference . . . as opposed to an absolute rejection of that tenet of law.” *Id.* Instead, it read *McConnell* as creating “an exception to the traditional rule of deference” because in that case “the university failed to honor its contract and the evidence did not substantially support the facts concluded by the university’s review board.” *Id.* at 228-29. The court found that deferential review was especially warranted because the parties had contractually agreed to a disciplinary procedure that contained both procedural and substantive due process safeguards. Therefore the court would not substitute its judgment unless the university “had acted fraudulently, in bad faith, abused its discretion, or infringed on constitutional rights.” *See id.* at 242.

McConnell is based on case-specific facts that are readily distinguishable. That case involved an associate professor of mathematics at Howard University. During one of his classes one of his female students called him a “condescending, patronizing racist.” The professor demanded her apology, and she refused. The professor then taught the remainder of the class without incident. After class, the professor asked her to remain so that he could speak with her. She refused. The professor tried to meet with her again before the next class session, and she again refused to speak with him. The professor then raised the subject during class, and the student refused to apologize or explain her actions. The professor asked her to leave the classroom, and, when she refused to do so, he called security. She was taken to the Office of the Dean for Special Student Services. The dean requested an apology from the student, and she again refused to do so. The dean advised her that her conduct was unacceptable and that any further activity of this kind would result in disciplinary action.

At the next meeting of the class, the professor renewed his request that she either apologize or leave the room. The student refused to do either. The professor then dismissed the entire class. The next day, the professor sent a letter to the dean requesting that disciplinary action be taken against the student, and that she be removed from his class pending satisfactory resolution of the situation. The professor told the dean that he would not return to the classroom until the “right atmosphere” was reestablished by having the student either apologize or remove herself from the class. Instead of taking steps to support the professor, the dean directed him to resume teaching.

On the next day of class, the dean accompanied the professor into the classroom. The professor renewed his request for an apology, and the student refused. The professor then gave the following statement to the class:

It will be clear to most of you that a proper academic atmosphere conducive to teaching and learning is not possible in the presence of a person who persists in her right to slander the teacher. I have requested the administration of this University to restore conditions to this classroom in which you and I can resume our proper work. I remain hopeful that they will soon do this. We shall resume as soon as they do.

He then left the classroom, and the dean proceeded to teach the class. That same day, the dean sent the professor a letter indicating that slander was not an offense under the university’s code of conduct, and that no further action would be taken with regard to the student.

The university subsequently instituted formal charges seeking termination of the professor’s appointment. A Grievance Committee, composed of five tenured faculty members, was convened to conduct a hearing and make findings and recommendations. After conducting a two-day hearing, the committee found that the professor did not neglect his professional responsibilities and that termination was not warranted. The Grievance Committee noted that the incident must be placed “within a broader context of professorial authority inherent in the teacher-student relationship,” and that “[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships.” In addition to exonerating the professor’s actions, the Grievance Committee pointed to the failure of the university to take adequate steps to support the professor in the “aftermath” of the incident.

While the Faculty Handbook required the dean to transmit the Grievance Committee's full report to the Board of Trustees, there was evidence in the record to support the conclusion that only a two-page summary and a supplemental report had been provided. Despite the findings of the Grievance Committee, the Board of Trustees voted to terminate the professor's appointment.

On appeal, the court held that the breach of contract claim could go forward based on numerous reasons, including classroom discipline, who's fault caused the disruption and cancellation of the class, the university's role to protect the teacher, who had the authority to restore order in the class, and whether the university breached an obligation it owed to him in the way it handled the incident. Unlike in this case, the professor in *McDonnell* was clearly not given a fair hearing by the perfunctory procedure used and the overruling of the Grievance Committee's recommendation based on a two-page summary. The Court finds that *McDonnell* is limited to the particular facts cited and not the general proposition that a court can never give deference to a university's disciplinary decisions.

Roberts v. Columbia Coll. Chicago, 821 F.3d 855 (7th Cir. 2016) is also inopposite. There, Columbia College Chicago ("Columbia") terminated a professor after it discovered that he had plagiarized several chapters in a textbook that he wrote. The court cited *McConnell* to support the conclusion that the university's internal review procedures did not prevent the professor from seeking judicial review. The applicable provision stated that terminated tenured professors wishing to seek review of the university's decision "may do so solely in accordance with the following provisions of this Section IX.D.2.b., allowing for a review by the [ERC]." According to the court, this provision merely clarified the internal review procedures for professors seeking to challenge the termination decision *within Columbia itself*. The court then addressed the professor's allegations that the university breached its contract. Notably, the court actually gave deference to the university by limiting its review to an evaluation of whether the university acted in good faith and whether it reasonably exercised its discretion. For these reasons McAdams' reliance on *Roberts* is also misplaced.

Courts in other jurisdictions have given deference to a university's decision to terminate or discipline a tenured professor. For example, in *Gertler v. Goodgold*, 107 A.D.2d 481, 487 N.Y.S.2d 565, *aff'd*, 66 N.Y.2d 946, 489 N.E.2d 748 (1985), the court stated that "since the academic and administrative decisions of educational institutions involve the exercise of

subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny.” *Id.* at 485. The court added that “[t]his public policy is grounded in the view that in matters wholly internal these institutions are peculiarly capable of making the decisions which are appropriate and necessary to their continued existence.” *Id.* The court stated that while judicial review is available, a reviewing court is limited to an inquiry as to whether the educational institution abided by its own rules, acted in good faith, or acted arbitrarily. *Id.* at 486.

Similarly, in *Collins v. Univ. of Notre Dame du Lac*, 2012 WL 1877682 (N.D. Ind. May 21, 2012), a tenured professor at Notre Dame sued the university after the university dismissed him. The professor argued that the university breached his contract by not following the proper procedures and by dismissing him without proper cause. On summary judgment, the court noted that “[i]n reviewing the universities’ actions regarding tenured professors, the courts are reluctant to second-guess the administrative decisions.” *Id.* at *4. Accordingly, the court stated that it would refrain from addressing the substantive violations of the contract unless the university “clearly violated its dismissal procedure.” *Id.*

This Court finds that deference in this case is warranted for a number of reasons. Most importantly, Dr. McAdams expressly agreed as a condition of his employment to abide by the disciplinary procedure set forth in the Faculty Statutes, incorporated by reference into his contract. The parties’ contract incorporates a specialized standard for cause that focuses on issues of professional duties and fitness as a university professor. The Faculty Statutes afforded Dr. McAdams with a detailed, quasi-judicial process which gave him an adequate opportunity to meaningfully voice his concerns. As will be explained, Marquette complied with the procedural requirements set forth by the Faculty Statutes. Under these circumstances, public policy compels a constraint on the judiciary with respect to Marquette’s academic decision-making and governance. Professionalism and fitness in the context of a university professor are difficult if not impossible issues for a jury to assess, which is likely why the model standards from the AAUP assign that judgment to a committee of professional peers with oversight by the executive officer or governing board. For these reasons, deference is appropriate.

In light of the deferential review of Marquette’s disciplinary decision-making, questions remain as to the appropriate level of deference that must be afforded, and whether deference

should also be given to President Lovell's additional demands. With respect to the level of deference, both parties rely on the sliding scales of deference afforded to administrative agencies, which are contingent upon the level of the agencies' experience, technical competence and specialized knowledge. In *M.M. Schranz Roofing, Inc. v. First Choice Temp.*, 2012 WI App 9, 338 Wis. 2d 420, the court of appeals explained the various levels of deference as follows:

When we afford "great weight" deference to the agency's interpretation, we will sustain a reasonable agency conclusion even if an alternative conclusion is more reasonable. We give "great weight" deference to the agency's interpretation when all of the following conditions are met: (1) the agency was charged by the legislature with the duty of administering the statute, (2) the interpretation of the agency is one of long-standing, (3) the agency employed its expertise or specialized knowledge in forming the interpretation, and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

In affording "due weight" deference to the agency's interpretation, we will not overturn a reasonable agency decision that comports with the purpose of the statute unless we determine that there is a more reasonable interpretation available. We afford "due weight" deference to the agency's determination when it has some experience in an area, but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute.

When we review an agency decision "de novo," we give no deference to the agency's interpretation. De novo review is appropriate if any of the following is true: (1) the issue before the agency is clearly one of first impression, (2) a legal question is presented and there is no evidence of any special agency expertise or experience, or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance.

Id., ¶ 7. Here, we do not have an "agency" determination to start with but a contracted and agreed upon FHC decision and recommendation and President Lovell's additional requirements.

Dr. McAdams argues that de novo review is appropriate because: (1) the FHC had never met before to consider a contested dismissal and the issues presented in McAdams' case were necessarily issues of first impression; (2) McAdams' case presented complex legal issues regarding contract interpretation for which the FHC had no particular expertise; and (3) if the FHC's position has not been "so inconsistent that it provides no real guidance," that is only

because the FHC had never opined on the issues.² The Court is not persuaded by this argument. De novo review amounts to no deference and would render the Faculty Statutes and the hearing as required by the Faculty Statutes null and void. This the Court does not accept, and the Court holds that Marquette is entitled to at least some degree of deference.

Marquette argues that it is entitled to “great weight” deference because: (1) the FHC and President Lovell were charged by the parties’ contract with administering the Faculty Statutes; (2) the decisions reached were based on long-standing interpretations of academic standards promulgated by the AAUP; (3) the members of the FHC and President Lovell brought over two centuries worth of experience in academia to the task of assessing this matter; and (4) the 123-page analysis provides uniformity and consistency in the application of the Faculty Statutes.

As to Marquette’s claim of “great weight” deference, the Court is not convinced that “great weight” deference is appropriate. Marquette is a private university and has not been charged by the legislature with the duty of administering its internal grievance process. In addition, Marquette has not produced any documentation to support the conclusion that it has a long-standing interpretation of discretionary cause under Section 306.03. Thus, great weight deference is not appropriate. However, not granting any deference, as Dr. McAdams argues, would render the Faculty Statutes null and void and would render the FHC decision and recommendation useless in articulating what the professional obligations of a professor are.

The Court finds that the applicable standard to apply is more akin to “due weight deference,” in which the Court will not overturn a reasonable decision that comports with the purpose of the contract. Accordingly, this Court will not disturb Marquette’s decision unless (1) Marquette failed to follow the procedures contractually agreed upon in the Faculty Statutes or (2) Dr. McAdams can demonstrate fraud, bad faith, abuse of discretion, or infringement of Constitutional rights. *See Yackshaw*, 89 Ohio App. 3d 237, 242, 624 N.E.2d 225.

Also, the decision by Marquette and Dr. McAdams pursuant to the contract to have their dispute considered by a nonjudicial panel is similar to agreeing to arbitrate. As noted in Marquette’s brief, “[t]he rule is well settled that courts will not substitute their judgment for the

² McAdams noted that only once before in Marquette’s 135-year history has a faculty member been terminated for cause. McAdams Br. at 13. The faculty member who received a notice of termination for cause in the 1990s did not request a hearing under the Faculty Statutes and did not otherwise contest the termination. *Id.* (citing Ex. T33).

arbitrator's because the parties contracted for a nonjudicial factfinding and decision." *See* Marquette Br. at 14 (citing *Madison v. Madison Prof'l Police Officers Ass'n*, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988)). Overturning an arbitration decision requires "perverse misconstruction or positive misconduct," "manifest disregard of the law, or if the award itself is illegal or violates strong public policy." *Id.* (quoting *Milwaukee Bd. Of School Dirs. v. Milwaukee Teachers' Educ. Ass'n*, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980)).

Therefore, the standard the Court will use is identical to that applied by the *Yackshaw* court, that is, barring action that was fraudulent, taken in bad faith, an abuse of discretion, or infringing on constitutional rights; it is not the Court's place to substitute its judgment for that reached by Marquette. *Id.* at 228. Since the parties' contract defined the procedures to be used, the Court will consider whether there is substantial evidence to support the suspension and effective termination. Review will be limited to the record assembled by the FHC, and due weight will be given to their findings.

II. The Court will also give due weight deference to the letter from President Lovell which required, as a condition of reinstatement, that Dr. McAdams apologize and acknowledge that his conduct was reckless.

An issue related to whether to give deference to the FHC Report is the issue of whether the Court must also defer to President Lovell's March 24, 2016 decision to demand, as a condition of reinstatement, that Dr. McAdams provide a written statement expressing his "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University," which Dr. McAdams refused to do. He characterized the letter as requiring him to engage in "compelled speech." McAdams' fourth cause of action for breach of contract alleges, "Marquette lacks the necessary cause to terminate Professor McAdams." Dr. McAdams characterized the letter from President Lovell as an attempt at coercion and stated that "Marquette's termination of Professor McAdams violates [his] contract and his right to academic freedom." Complaint at ¶¶ 64-73. This case does not involve a president's bad faith decision to ridicule or embarrass a professor in a public forum. To the contrary, Dr. McAdams' written statement was to be shared confidentially with Ms. Abbate for the purpose of assuring that something similar would not happen again in the future.

Moreover, the FHC expressly noted in its report that Dr. McAdams was unwilling to take responsibility for his actions, and that he never expressed regret for his actions. The FHC stated:

The record before us clearly demonstrates that Dr. McAdams does not view himself as bound by the fundamental norms of the university, or of the academic profession, or indeed by any consistently applicable body of norms. He has instead assembled his own moral code cobbled together from various sources, to be applied as he sees fit.

FHC Report at 103-104. Dr. McAdams' peers perceived that he did not view himself as bound by norms of the university, which confirms that President Lovell's condition of reinstatement was consistent with the recommendation of the FHC. It would not have been prudent for Marquette to have reinstated Dr. McAdams as a tenured professor while he continued to show no signs of regret or willingness to be more responsible with regard to his blog, especially concerning the identification of graduate students.

Moreover, Dr. McAdams' own expert witness – Dr. Donald Downs – testified that it would make no sense to invite Dr. McAdams back without getting a commitment from him to change. He further testified that in such a case he would advise the university to ask for an assurance. *See* Marquette Br. at 33 (citing Downs Depo. 106:10-16, 106:23-107:11). Ultimately, although the FHC recommended only suspension and not termination, Dr. McAdams did in fact have an opportunity to return to teaching at Marquette University had he chosen to comply with the condition required by President Lovell. It was his own refusal to do so that resulted in his continued suspension.

Last, according to McAdams, if the FHC wanted President Lovell to impose any additional requirements, it would have included them in its report. The Court will defer to President Lovell's decision because the ultimate authority to make the final disciplinary decision rests with the university president. Section 307.07 states, "If the FHC concludes that an academic penalty less than dismissal is warranted by the evidence, its findings of fact and conclusions will set forth a recommendation to that effect together with supporting reasons" and "The FHC will issue its findings of fact and conclusions, together with any supporting reasons, to the President of Marquette University . . ." *Id.* at ¶¶ 18-19. This section makes it clear that the role of the FHC is to make a *recommendation* to the president, who in turn has the authority

to make the final decision. President Lovell sought to enforce, not breach, Dr. McAdams' contractual obligations by implementing the recommendation of the FHC. For these reasons, the Court finds that the requests made by President Lovell were consistent with the FHC Report and will therefore defer to the requirements of his letter.

III. Dr. McAdams was afforded the process that he was due in accordance with his contract because Marquette complied with the procedures set forth in Section 307.07 of the Faculty Statutes.

The Court finds that the FHC substantially complied with the procedures as outlined in the Faculty Statutes. In Dr. McAdams' fifth cause of action for breach of contract, he alleges that Marquette violated his due process rights under the contract. Complaint at ¶¶ 74-92. The FHC was comprised of seven tenured faculty members elected by the faculty as a whole pursuant to Section 307.07(6), and they conducted a hearing for four days. Multiple witnesses were called and subject to examination, five called by the University, two called by Dr. McAdams, and one called by the FHC itself. *See* FHC Report at 10. Both the University and Dr. McAdams were represented by counsel, and a member from the AAUP was present as an observer. The FHC received sixty exhibits containing 734 pages of material and two recordings, made over 300 findings of fact using the "clear and convincing" burden of proof, and a court reporter compiled 866 pages of testimony. *Id.* Subsequent to the hearing, the FHC met to deliberate seven times and ultimately issued a 123-page report containing its recommendation, in which it held unanimously that the evidence showed clearly and convincingly that Dr. McAdams "failed to meet the standard of professional excellence that generally characterizes University faculties." *Id.* at 100. The FHC recommended a one to two semester suspension, and noted that the University had not presented sufficient evidence demonstrating cause to warrant dismissal. *Id.*

Concerning alleged procedural defects at the FHC hearing, Dr. McAdams points to Sections 307.07(7) and (11). Section 307.07(7) discusses removal of a FHC member for bias, and Section 307.07(11) discusses allowing the petitioner to obtain necessary witnesses and documentation. Although Dr. McAdams asserts that Marquette "deliberately abused the FHC process to give itself strategic and tactical advantages" and "tilted the playing field by withholding information" to "game the system," there is no evidence to support these claims.

See McAdams Resp. Br. at 3. The Court does not find these arguments to be persuasive and finds that there was substantial procedural compliance by the University such that Dr. McAdams was afforded the process that he was due pursuant to the parties' contract.

a. FHC Decision to Allow Dr. Lynn Turner to Serve on the FHC

First, Dr. McAdams argues that there was a biased faculty member serving on the FHC, Dr. Lynn Turner of the Department of Communication Studies, who refused to recuse herself. Turner signed an open letter published in the Marquette Tribune that was critical of Dr. McAdams and supportive of Ms. Abbate. See McAdams Br. at 35. On August 24, 2015, counsel for Dr. McAdams requested the recusal of both Dr. Lynn Turner and Dr. John Pauly. Pauly was the Provost at the time of a 2011 incident involving Dr. McAdams, and on September 3, 2015, he recused himself from all further proceedings. However, the FHC unanimously rejected the motion to recuse Turner. Its reasons were explained in a letter to the parties dated September 16, 2015. See FHC Report at 9. The letter stated the following reasons for allowing Turner to continue to serve on the FHC:

First and foremost, Dr. Turner does not meet the standard for recusal. Although counsel for Dr. McAdams cites the potential for "the appearance of bias," drawing an analogy to judicial recusals, that is neither the correct standard nor the proper analogy. FS § 307.07 ¶ [7] provides that members shall remove themselves, or be removed, only for "bias or interest," either in their own discretion or in the discretion of the committee. Indeed, "bias or interest" is the only ground on which the committee is permitted to remove one of its own members; the mere "appearance" will not suffice.

...

Nor does it matter that Dr. Turner has publicly stated an opinion, and other committee members have not, or at least not in ways that were recorded and have come to light. Since the standard is actual "bias or interest," and not the mere public appearance of bias or interest, any "commitment to a particular view of the matter . . . taken before the opportunity for investigation," even an internal one, would require recusal under counsel's interpretation of the standard. That is thoroughly unworkable. . . .

FHC Report at 143, App. D (September 16, 2015 letter from FHC to parties). (Internal citations omitted.) As noted in the letter, Section 307.07(7) explicitly states that "[r]emoval of a member for bias or interest is at the discretion of the FHC." For these reasons, the Court finds that the

FHC carefully considered the issue of allowing Dr. Turner to serve on the FHC. The FHC did not abuse its discretion, and this Court will defer to their conclusion that there was no procedural violation.

b. Opportunity to Obtain Prehearing Documentation and Evidence

Second, regarding Section 307.07(11), Dr. McAdams argues that he was not afforded an opportunity “to obtain necessary witnesses and documentation or other evidence” or “to examine the evidence submitted to the FHC by the University Administration.” *See* § 307.07(11). Section 307.07(11) states:

[T]he subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence and is entitled to examine the evidence submitted to the FHC by the University Administration. The Administration also will cooperate with the FHC in securing witnesses from the University and making available documentary or other evidence. Likewise, the Administration will be entitled to examine documentary or other evidence submitted to the FHC by the subject faculty member.

Id. Dr. McAdams contends that Marquette refused to make “documentary or other evidence” available to him. *See* McAdams Br. at 31. He states that “Marquette deliberately abused the FHC process to give itself strategic and tactical advantages at the hearing by withholding documentary evidence and access to witnesses.” *Id.* He also states, “Only after McAdams filed suit and Marquette was forced to produce relevant documents has McAdams discovered that Marquette had and failed to disclose documents that would have been essential to the preparation of his case before the FHC.” *Id.* at 32. Among the evidence that was not provided by Marquette, Dr. McAdams specifically references documents showing that Ms. Abbate encouraged some of the publicity, that she threatened Marquette in order to be paid “reparations,” and that she had applied to the University of Colorado the year before and was denied admission. *See id.* He also states that Marquette refused to give the FHC all of the relevant emails that Ms. Abbate had received. She received a total of 135 emails and letters commenting on the situation. “Of the 135, 49 were supportive of her, 85 criticized her, and one was neutral.” *Id.* Of the 85 that criticized her, in McAdams’ opinion, “only 18 were distasteful.” *Id.* However, the Faculty Statutes do not set forth a right of pre-hearing discovery akin to that provided in civil litigation. *See* FHC Report at 18. Further, the Court finds that the substance of the evidence that was not

provided, such as the issue of who actually caused the nationwide publicity, is not material and not dispositive of the case.

Dr. McAdams also argues that Marquette failed to make witnesses against him available, including Ms. Abbate. *Id.* at 33. He claims that he was denied the right to cross examine witnesses because Marquette submitted statements and other documents authored by individuals that it did not also call as witnesses. *Id.* However, the Faculty Statutes specifically provide, “The FHC will not be bound by legal rules of evidence and may admit any evidence that is deemed probative of the issues involved in the proceedings.” *See* Section 307.07 ¶ 17. It follows from that statement in the contract that hearsay is admissible. Also, Dr. McAdams received all of the documents submitted to the FHC ahead of time and was free to call additional witnesses if he wanted to follow up on those statements. *See* Marquette Resp. Br. at 27.

Next, Dr. McAdams claims he was not allowed to depose the various witnesses before the FHC hearing. *See* McAdams Br. at 33. The Court finds this argument to be unpersuasive since he has only taken one deposition, that of Dr. Lowell Barrington, despite having the opportunity to depose others. *See* Marquette Resp. Br. at 25-26 (citing Weber August 4, 2015 Letter at 3 (Trigg Aff. 3 Ex. 9)); *See also* McAdams Br. at 27-28. Counsel for Marquette and Dr. McAdams had arranged and scheduled the depositions of Drs. South, Holz, Snow and Callahan, President Lovell and Ms. Abbate, but counsel for McAdams cancelled them all. *See id.* Ms. Abbate was not willing to make herself available to Dr. McAdams’ counsel for an interview. The FHC concluded, “[t]here is no obligation that each side turn over all material relevant to any party’s claim or defense in preparation for the hearing, or to ‘make available’ witnesses for some sort of pre-hearing deposition that is nowhere mentioned in the statutes.” FHC Report at 148 (citing FS § 307.07(11)). The Court agrees that nowhere in Section 307.07(11) does the contract state that the faculty member will have the right to interview any witnesses prior to the hearing.

Subsequent to the FHC issuing its recommendation, Dr. McAdams raised procedural concerns with the AAUP, which responded that he had been afforded what the AAUP considers to be academic due process. *See* Marquette Resp. Br. at 27 (citing Trigg Ex. 24). Ultimately, the Court finds that the FHC did not violate any procedures as set forth in Marquette and FHC followed the procedures set forth in the Faculty Statutes, the Court finds that the FHC

recommendation and subsequent letter from President Lovell do not demonstrate fraud, bad faith, or an abuse of discretion.

The FHC concluded, and the Court agrees, that the Faculty Statutes do not set forth a right of pre-hearing discovery akin to that provided in civil litigation. *See* FHC Report at 18. Dr. McAdams was provided with all necessary witnesses and other evidence that was required by his contract, and his requests for discovery were outside of the scope of the Faculty Statutes. Therefore, the Court grants summary judgment in favor of Marquette on the fifth cause of action.

IV. Dr. McAdams does not have an actionable claim for breach of contract based on the initial suspension because there are no recoverable damages.

Dr. McAdams argues that if this Court grants deference to the FHC, it must also give deference to the FHC's conclusion that Marquette abused its discretion when it initially suspended Dr. McAdams with pay. The Court agrees with that statement and will defer to the entire FHC report. Dr. McAdams' first cause of action for breach of contract alleges that his "initial [] suspension and banning from campus from December 16, 2014 through March 31, 2016" were unlawful. Complaint at ¶¶ 23-45. For the reasons stated below, the Court finds that Marquette failed to follow the proper procedures when it initially suspended Dr. McAdams with pay and banned him from campus, but the Court nevertheless grants summary judgment in favor of Marquette on this cause of action because there are no recoverable damages with regard to the initial breach.

Section 307.03 sets forth the notice requirements for cases of non-renewal, suspension, or termination. Pursuant to the contractually agreed upon Faculty Statutes, notice must include:

1. The statute allegedly violated; the date of the alleged violation; the location of the alleged violation; a sufficiently detailed description of the facts constituting the violation including the names of the witnesses against the faculty member.
2. The nature of the University's contemplated action, with a specification of the date or dates upon which such action is to become effective with respect to faculty status, duties, salary, and benefit entitlements, respectively.
3. Such notice shall be personally delivered . . .

Id. The initial suspension letter from Dean Holz, dated December 16, 2014, did not comply with these notice requirements. It informed Dr. McAdams that he would be “relieved of all teaching duties and removed from all other faculty activities, including but not limited to advising, committee work, faculty meetings and any other activity which would necessitate your interaction with students, faculty and other Marquette staff.” *See Aff. of Clyde A. Taylor*, Ex. T23. The letter went on to state, “You are to remain off campus during this time, and should you need to come to campus, you are to contact me in writing beforehand to explain the purpose of your visit, obtain my consent and make appropriate arrangements for that visit.” *Id.* Attached to the letter were copies of the Marquette harassment policy, the University guiding values, the University mission statement, and sections from the Faculty Handbook, but Dean Holz did not include any of the notice requirements detailed in Section 307.03. Therefore, it is evident that the initial suspension was an abuse of discretion by Marquette University.

However, for a several reasons, the Court finds that the damages for the initial breach are *de minimis*. *De minimis* is defined as “so insignificant that a court may overlook it in deciding an issue or case.” Black’s Law Dictionary (10th ed. 2014). First, Dr. McAdams received pay and benefits during the initial suspension, which continued until the FHC decision was implemented by President Lovell on March 24, 2016. Second, the suspension was over winter break. Fall semester classes were over by December 16, 2014, so Dr. McAdams had no teaching duties at that time. Third, Marquette corrected its procedural error almost immediately with its letter dated January 30, 2015. Regarding the initial banishment from campus, Marquette permitted Dr. McAdams to return to campus to gather his materials and offered him an alternate office during the ban, an offer which Dr. McAdams refused. FHC Report at 64. Dr. McAdams was allowed back on campus beginning February 13, 2015. Fourth, Dr. McAdams cannot recover for emotional distress on a breach of contract claim. Compensatory damages for breach of employment contract are limited in Wisconsin to lost wages and expenses incurred in obtaining new employment; damages for emotional distress, humiliation and loss of reputation are not recoverable. *See Bourque v. Wausau Hosp. Ctr.*, 145 Wis. 2d 589, 597, 427 N.W.2d 433, 436 (Ct. App. 1988) (citing *Mursch v. Van Dorn Co.*, 627 F. Supp. 1310, 1316–17 (W.D. Wis. 1986); *see also Christensen v. Sullivan*, 2009 WI 87, ¶ 86, 320 Wis. 2d 76, 121, 768 N.W.2d 798, 820.

Dr. McAdams himself posted on his blog the day after getting the letter from Dean Holz that the suspension was “kind of a joke.” *See* MU Warrior Blog Post, December 17, 2014; *See also* Trigg Ex. 19; Tr. Vol. III 34:2-7. During the initial suspension, Dr. McAdams finished a book that he had been working on. *See* Marquette Br. at 31 (citing Dr. McAdams Depo. 42:18-43:12; 168:1-9). Wisconsin Statute section 802.08(3) states, “When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” The only damages alleged by Dr. McAdams in regard to the initial breach are emotional distress, loss of reputation, and loss of present and future income. Not only has Dr. McAdams failed to present any facts showing he was emotionally distressed or suffered from a loss of reputation, but, as provided above, those damages are not recoverable in a breach of contract action. In addition, Dr. McAdams has not provided any facts supporting his allegation of loss of future income, and his original suspension was with pay so he suffered no losses at the time. For these reasons, the initial breach will be given no more effect than what it was given by the FHC, which nevertheless recommended a one or two semester suspension. Marquette’s breach in procedure with regard to the initial suspension cannot support a cause of action for breach of contract. Damages “are an essential element of a contract action,” and the lack of damages to Dr. McAdams requires dismissal of this claim. *See Black v. St. Bernadette Congregation of Appleton*, 121 Wis. 2d 560, 566, 360 N.W.2d 550 (Ct. App. 1984).

With his January 30, 2015, letter to Dr. McAdams, Dean Holz promptly corrected his procedural mistake on behalf of Marquette and properly followed the notice requirements of Section 307.03. This fifteen-page letter with attached exhibits identified Section 306.03 as being allegedly violated on November 9, 2014, the date of the internet blog post, and the letter included a detailed description of the facts constituting the violation including the name of Cheryl Abbate and her contact information. *See Aff. of Clyde A. Taylor*, Ex. T24. The January 30, 2015 letter also includes the nature of the University’s contemplated action, specifically, “revocation of the tenure previously granted to Dr. John McAdams and dismissal from the faculty” to be commenced as of the date of the letter. *Id.* Since Marquette corrected its procedural error almost immediately and followed the requirements of Section 307.03, the Court finds no actionable

procedural defect with regard to the initial suspension. Therefore, the Court grants summary judgment in favor of Marquette University on the first cause of action.

V. Academic Freedom and Freedom of Speech/Expression

Next, the Court will address whether Dr. McAdams' rights to academic freedom or freedom of speech or expression have been violated. Dr. McAdams' alleges as his fourth cause of action for breach of contract that "Marquette lacks the necessary cause to terminate Professor McAdams and Marquette's attempt to coerce Professor McAdams and Marquette's Termination of Professor McAdams violate Professor McAdams' contract and his right to academic freedom." Complaint at ¶¶ 64-73.

a. Academic Freedom

Turning first to the right to academic freedom, the Faculty Handbook proposes safeguards to that freedom. Relevant to this case is the following safeguard:

The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When [he] speaks or writes as a citizen, [he] should be free from institutional censorship or discipline.

Marquette University Faculty Handbook, *Rights and Responsibilities: Academic Freedom*, 45. In addition, the FHC noted that academic freedom is most essential when the ideas being promulgated reflect unpopular opinions, stating:

Discipline may seem obvious only if one concludes that academic freedom does not apply when someone's views are distasteful or out of the mainstream. But freedom to express one's views, even critical views, is a foundational principle of modern universities, and it is *most needed* when a faculty member's views are out of the mainstream..."

(Emphasis in original.) See FHC Report at 6. The Faculty Handbook defines three varieties of academic freedom: (1) Full freedom in research and in publication of the results; (2) Freedom in the classroom in discussing their subject; and (3) Freedom to make extramural statements as a citizen. *Id.* Freedom of research is nearly complete; freedom to teach is "limited by the need to remain germane to curricular requirements"; and extramural statements, to which Dr. McAdams' blog post qualifies, are subject to certain conditions and are the most limited category of

academic freedoms. See FHC Report at 110-111. The limitation on the freedom to speak and write as a citizen is evident in this clause from the Faculty Handbook:

When [he] speaks or writes as a citizen, [he] should be free from institutional censorship or discipline, but [his] special position in the civil community imposes special obligations. As a [man] of learning and an educational officer, [he] should remember that the public may judge [his] profession and institution by [his] utterances. Hence, [he] should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that [he] is not an institutional spokesperson.

Faculty Handbook, 45. As the FHC emphasized in its report, the right to academic freedom does not come without correlative responsibilities and obligations. The rights of faculty members “must be balanced against their responsibilities to their students, their colleagues, their universities, and their communities.” FHC Report at 110. Under the AAUP’s definition of academic freedom for extramural utterances, which Marquette incorporated into its Faculty Handbook, the protection is expressly balanced by other professional duties. FHC Report at 110-111. Faculty members must take into account the obligations imposed by their position to the subject, students, profession, and institution, be clear that they are not speaking for the institution, and promote conditions of free inquiry and public understanding of academic freedom. FHC Report at 114-16 (citing the AAUP *1940 Statement of Principles on Academic Freedom and Tenure* and AAUP “Statement on Professional Ethics” in *Policy Documents and Reports*, 11th ed., 15n6).

Academic freedom allows both faculty members and students to engage in intellectual debate without fear of censorship or retaliation and it establishes a faculty member’s right to remain true to his or her pedagogical philosophy and intellectual commitments. Academic freedom also gives both students and faculty the right to express their views without fear of sanction, unless the manner of expression substantially impairs the rights of others. On the other hand, academic freedom *does not* mean that a faculty member can harass, threaten, intimidate, ridicule, or impose his or her views on students. Neither does academic freedom protect faculty members from disciplinary action or sanctions for professional misconduct, when there has been due process.

As Marquette noted in its brief, “extramural utterances in violation of these obligations can constitute discretionary cause when, as here, they clearly demonstrate the faculty member’s unfitness for their position considering their entire record as a teacher and scholar.” Marquette Br. at 27 (citing FHC Report at 116). The FHC further explained that in the course of reaching the determination that Dr. McAdams violated his fundamental responsibilities to Marquette, to the scholarly profession, and to colleagues, “the Committee considered the balance **between rights and responsibilities** inherent in academic freedom, and nevertheless concluded that McAdams’s conduct rose to the level of clearly and substantially failing to meet the standard of professional excellence which generally characterizes University faculties.” (Emphasis in original.) FHC Report at 116. Dr. McAdams even conceded in his testimony that “there are some limits that really are professional obligations.” Marquette Reply Br. at 1 (citing FOF 115.5; Tr. Vol. IV at 46:16-48:22). In short, academic freedom gives a professor, such as Dr. McAdams, the right to express his views in speeches, writings and on the internet, so long as he does not infringe on the rights of others.

Here, Dr. McAdams conceded that he had a professional obligation not to name Ms. Abbate if she had been a graduate student in his department. As both Marquette and the FHC noted, Dr. McAdams “drew the line” at the boundaries of his department. His tenured peers, however, disagreed. They found his professional duties extended to Ms. Abbate, who was in the philosophy department (*i.e.*, as opposed to the political science department) . *Id.* (citing FHC Report at 104-105). This Court agrees with the FHC. Dr. McAdams’ distinction between blogging about students in his own department, as opposed to blogging about students in other departments, makes no sense since they all are graduate students that are entitled to the same protection against harassment and criticism. As Dr. McAdams own expert, Dr. Peter Wood, stated, “all members of the university” have a responsibility to graduate students “whether they are in that person’s department or not.” *See* Fourth Aff. of Steven T. Trigg, Ex. 6 at 96:17-97:20.

As Marquette noted in its brief, “the only justification Dr. McAdams offered the FHC for identifying Ms. Abbate was the alleged norms of journalism as he understands them from reading news outlets.” Marquette Br. at 24. However, Dr. McAdams is not employed by Marquette as a journalist. *See* FHC Report at 94. During the summary judgment hearing, counsel for Dr. McAdams again referenced journalistic norms and credibility as reasons for

using Ms. Abbate's name in the blog post. Tr. at 49:9-20 (February 2, 2017). Counsel for McAdams also mentioned there is no explicit prohibition on identifying a student by name and therefore Dr. McAdams did not have notice that he was doing anything wrong by using her name. *See id.* at 30:21-25 – 31:1-6. Although Dr. McAdams was criticizing Ms. Abbate in his blog on an issue of great institutional and public importance, he should have known that he had a duty to her as a graduate student. This is because the harm to Ms. Abbate was foreseeable, easily avoidable, and not justified. It is undisputed he could have posted the article without her name or contact information and made the same point.

Although Dr. McAdams may not have been given explicit notice that the specific actions he took in publishing his blog post about a graduate student could lead to termination proceedings, “no faculty member should need a specific warning not to recklessly take actions that indirectly cause substantial harm to others.” *See* FHC Report at 100. As stated above, Dr. McAdams' attempt to distinguish between graduate students of different departments makes no sense, and his argument thus fails to the extent it is based on a lack of notice regarding his responsibilities to graduate students in other departments. Moreover, Dr. McAdams was clearly on notice that mentioning a student's name on his blog was problematic. This was clearly pointed out in pages 35 through 40 of the FHC report, where the FHC identified numerous prior conflicts with colleagues and students. For example, in February of 2011, Dr. McAdams emailed a student listed as the contact on the Facebook page for the production of “The Vagina Monologues” and then called her at her permanent residence, disturbing her parents. He then wrote a blog post mentioning the student by name, and continued to blog about her by name when she complained about his behavior. FHC Report at 36. At a meeting in April of 2011, Dr. McAdams was made aware that his mention of an undergraduate student's name on his blog was a cause for concern. He promised to be more careful in mentioning student names. FHC Report at 38. He also recognized that mentioning students by name on his blog could lead to unwanted “blowback for students that aren't out front with highly visible political activity.” FHC Report at 39. Here, Ms. Abbate was a graduate student who was not involved in highly political activities, as she was merely talking to a student after class about the confines of what would be proper to discuss in class.

As set forth in the FHC Report:

Among the obligations that professors have are obligations to other members of the academic community. Although professors are not properly bound by ordinary social norms of civility, they are not free from all restraint with respect to their colleagues. One of the more important obligations that professors have is to take care not to cause harm, directly or indirectly, to members of the university community. Professors, of course, cannot be held responsible for all harm that results from their actions; some will be unforeseeable, some will be unavoidable, and some will be outweighed by other considerations. For example, a low grade justifiably awarded to a student for their performance in class may be harmful to that student's career, but that harm is overridden by other, stronger obligations of fair assessment. However, where substantial harm is foreseeable, easily avoidable, and not justifiable, it violates a professor's obligations to fellow members of the Marquette community to proceed anyway, heedless of the consequences.

FHC Report at 75-76. The Court finds that the conclusion by the FHC that Dr. McAdams' right to academic freedom was not violated is reasonable in light of the evidence. Even putting deference aside and deciding this issue independently, as a matter of law, the actions of Dr. McAdams in posting Ms. Abbate's name and contact information are clearly not an exercise of his "right of academic freedom," but an act he should have foreseen would create harm and anguish to a graduate student.

b. Freedom of Expression

Next, regarding the alleged violation of Constitutional rights, namely freedom of speech and expression, the Court first turns to Section 307.07(2), which states:

A faculty member who has been awarded tenure at Marquette University may only be dismissed upon a showing of absolute or discretionary cause . . . *Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution. . . .*

(Emphasis added.) § 307.07 ¶ 2. Similar to the Court's analysis of academic freedom, the Court emphasizes that rights have corresponding duties and that freedom of speech and expression is not absolute. Considering that speech is subject to an employment contract, to interpret the above provision to import "the full panoply of First Amendment rights" would lead to absurd consequences, as the FHC noted. *See* FHC Report at 117. In addition, Dr. McAdams

contractually agreed to be subject to peer disciplinary review as provided in the Faculty Statutes. § 307.07. Also, there is nothing in the record that suggests Marquette was using the proceedings against Dr. McAdams for pretextual reasons. *See* FHC Report at 120. The FHC decision was not about the content of the blog, so the Court is not concerned that its decision was content-restrictive. McAdams had actually been involved in at least six controversies involving his blog or internet or campus speech in the past. In each of those instances, the record shows that Marquette more or less went out of its way to avoid formally reprimanding him, so he had at least some form of notice that his actions in the future could potentially lead to sanctions. *See id.* Furthermore, the Court agrees that nothing in the proceedings suggested a lack of genuine concern about his blog post and its effect on Ms. Abbate. *See id.*

There has been some dispute in the parties' briefing for this motion regarding whether Ms. Abbate should be treated as an instructor or as a student. The record is clear she was both. Therefore, the fact that she was nevertheless a graduate student cannot be ignored. In his blog post, Dr. McAdams made the deliberate decision to include Ms. Abbate's name and a link to her contact information and personal website. The FHC found that this caused substantial harm to Ms. Abbate, which was foreseeable, easily avoidable, and not justified. Dr. McAdams' actions are in direct conflict with Marquette's foundational value as a Jesuit University of *cura personalis* – care for the whole person. Marquette incorporated this tenet into its Mission Statement providing that the Marquette community takes seriously its "responsibility... to offer personal attention and care to each member of the Marquette community." *See* FHC Report at 76-77. The Marquette community includes "*faculty*, staff, *students*, trustees, alumni and friends..." (Emphasis added) *Id.* Dr. McAdams' blog post violated his duty owed to Ms. Abbate in her role as *both* a student and as a member of the faculty.

The Court finds that there is substantial evidence in the record to support the finding of the FHC. McAdams notes "that the blog post did not urge unlawful action and was not phrased in obscene or even intemperate language." McAdams Br. at 20. However, the use of a graduate student's name and contact information in Dr. McAdams' blog post, which resulted in substantial harm to that student, albeit indirectly, was where Dr. McAdams crossed the line. The clickable link to her personal website made her easier to attack. The personal attacks on Ms. Abbate caused her to switch schools, abandon her dissertation and repeat many graduate courses.

The abusive, vicious, and hateful communications sent to Ms. Abbate caused her to fear for her safety, suffer negative mental and physical effects, forced her to shut down her email account, hide her contact information, and sabotaged her reputation on public ranking boards. In addition, as a result her PhD was set back by years. *See* Marquette Br. at 22 (citing FHC Report at 88-89). As noted by Marquette, Dr. McAdams' primary purpose was not to defend an undergraduate student, but instead was to embarrass a graduate student. *See id.* at 20. Also, the evidence has shown that he has continued to blog about Ms. Abbate, exacerbating the harm. *See* Marquette Br. at 21 (citing FHC Report at 86).

Our Supreme Court has stated with regard the right of freedom of speech that "by its very nature every right is related to a duty to exercise it so as to cause a minimum of harm to another" and "that one who seeks freedom may not wholly ignore his neighbor's right to it." *Vogt, Inc. v. International Broth. Of Teamsters, Local 695, A.F.L.*, 270 Wis. 315, 320-21, 74 N.W.2d 749 (1956). Therefore, although the harm to Ms. Abbate was caused indirectly, there is no dispute that had Dr. McAdams not used her name and contact information in his blog post, the harm would not have occurred. Again, this demonstrates that there was substantial evidence to support the FHC conclusion, which this Court fully agrees with, that "the University has demonstrated by clear and convincing evidence that Dr. Dr. McAdams clearly and substantially failed to meet the standard of professional excellence that generally characterizes University faculties," and "that violation will probably substantially impair his value." *See* FHC Report at 33. Therefore, the Court grants summary judgment in favor of Marquette on the fourth cause of action.

VI. Marquette did not breach McAdams' contract by choosing not to renew and reappoint him.

Dr. McAdams' third cause of action is that Marquette breached his contract by failing to renew and reappoint him. Complaint at ¶¶ 56-63. He alleges that as a tenured faculty member he was entitled to annual reappointment at a rank and compensation not less favorable than those which he previously enjoyed and that Marquette breached this provision in 2015 and 2016 by failing to reappoint him. *See id.*; *See also* Marquette Br. at 31-32.

The Court adopts the previous discussion and findings as to this cause of action and also concludes that the actions by Marquette complied with the Faculty Statutes to which the parties

had contractually bound themselves. Since there was ultimately no breach of contract, Dr. McAdams cannot claim any damages. Marquette complied with the parties' contract, and Marquette's decision not to renew and reappoint Dr. McAdams was reasonable in light of the evidence presented to the FHC. Therefore, the Court grants summary judgment in favor of Marquette on the third cause of action.

The Court is also granting summary judgment in favor of Marquette on the second cause of action, that "Marquette lacks the necessary cause to suspend Professor McAdams without pay from April 1, 2016 through January 17, 2017." Complaint at ¶¶ 46-55. The Court has already found that the FHC demonstrated by "clear and convincing evidence" that Marquette possessed discretionary cause to discipline Dr. McAdams. Since the claims on the second and third causes of action are similar and, more importantly, since there was ultimately no breach of contract, the Court will also grant summary judgment on the second cause of action in favor of Marquette.

VII. Marquette did not breach the implied covenant of good faith and fair dealing because the acts complained of are specifically authorized in the contract.

Dr. McAdams' sixth cause of action is that Marquette breached the implied covenant of good faith and fair dealing. Complaint at ¶¶ 93-107. Dr. McAdams cites a number of instances to support his claim that Marquette breached its implied covenant of good faith and fair dealing. First, he claims that Marquette failed to conduct a neutral and unbiased initial investigation by appointing Associate Dean South to gather information for Dean Holz, despite prior issues he had with Dr. McAdams and his relationship with Ms. Abbate as her mentor. *See* McAdams Br. at 37. Second, McAdams also makes claims regarding his access to campus and the suspension of his duties. Third, McAdams argues that Marquette failed to turn over information relevant to its decision prior to the FHC hearing. *Id.* at 38. Last, McAdams claims that the FHC decision to allow Turner to serve on the FHC was a violation of this implied duty. *Id.* at 37.

There is a duty of good faith and fair dealing in every contract. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521 (Ct. App. 2002); *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 793, 541 N.W.2d 203, 211 (Ct. App. 1995) (approving jury instruction that "[e]very contract implies good faith and fair dealing

between the parties”). A breach of contract may also occur when a party’s actions are inconsistent with the principles of good faith and fair dealing. *See Daughtry v. MPC Systems, Inc.*, 2004 WI App 70, ¶55, 272 Wis. 2d 260, 679 N.W.2d 808 (Ct. App. 2004). However, where a party to a contract complains of acts of the other party that are specifically authorized in their agreement, there can be no breach of good faith and fair dealing. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521.

In the present case, the acts mentioned above that Dr. McAdams complains of were all authorized in the contract, so his claim for breach of good faith and fair dealing fails. McAdams first points to the biased investigation as a breach of the duty of good faith and fair dealing. *See* McAdams Br. at 37. He states that allowing Dr. South to serve as the lead investigator was a breach of the duty because he was a friend and mentor to Ms. Abbate and had already made up his mind. *See id.* However, the Faculty Statutes are completely silent about what any investigation must entail. Also, the FHC noted that Dean Holz’s decision to conduct an investigation merely initiated the process that followed, and Dean Holz supervised the investigation throughout the process. *See* Marquette Resp. Br. at 34 (citing FOF 141; FHC Tr. Vol. III 80:6-15). More importantly, the FHC was clear that it “in no way relied on that investigation in reaching its conclusions.” FHC Report at 19.

Second, Dr. McAdams points to the public statements by Marquette “that falsely implied that Professor McAdams was a physical danger to students necessitating his banishment from campus.” McAdams Br. at 37. However, Marquette never actually said that Dr. McAdams was a physical danger to students. Marquette sent a document to the Milwaukee Journal Sentinel which made it clear that Marquette was responding to threats to Ms. Abbate, which occurred because of the blog post, “putting [her] in harms way.” *See* Marquette Resp. Br. at 5 (citing Trigg Aff. 3 Ex. 5). Regardless, the decision by the FHC had nothing to do with statements made by Marquette to the Milwaukee Journal Sentinel. Those statements regarded the initial suspension, and the Court has already determined that there are no recoverable damages for the initial breach. Moreover, as stated previously at Section IV, Dr. McAdams was allowed back on campus as of February 13, 2015, but he made the decision to work from home instead.

Third, Dr. McAdams argues that Marquette's refusal to produce key documents was a breach of good faith and fair dealing. Again, the Court has already concluded that the FHC process did not afford the parties discovery akin to that of civil litigation and that Marquette did not breach the contract by not providing all of the evidence and documents requested by Dr. McAdams. The Court rejects the statement by McAdams that this action by Marquette "demonstrates Marquette never intended to give Dr. McAdams a fair hearing." *Id.* at 38. There is simply no evidence to support such a claim. As discussed in Section III, the FHC found and the Court agrees that Marquette gave Dr. McAdams all the required exhibits and information that were called for under the parties' contract.

Last, Dr. McAdams references allowing Dr. Turner to serve on the FHC, but the Court has already found that did not create a breach of contract or procedural defect because allowing members to serve on the FHC is explicitly within the discretion of the FHC. This is an example that the acts being complained of are specifically authorized in the parties' agreement, so there can be no breach of good faith and fair dealing. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521. Therefore, the Court grants summary judgment in favor of Marquette on the sixth cause of action.


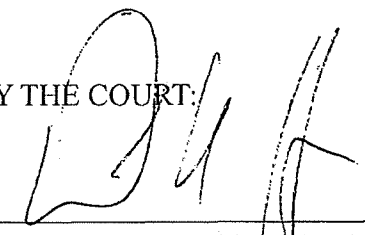
CONCLUSION

Based on the evidence discussed herein, giving due deference to the FHC report, the Court finds that the FHC's conclusions and recommendations were reasonable and supported by substantial evidence adduced at the hearing. This Court also finds that the letter from President Lovell setting forth conditions for Dr. McAdams's reinstatement was consistent with the FHC recommendation and is also supported by substantial evidence.

For the above reasons, Plaintiff John Dr. McAdams' motions for summary judgment are DENIED and Defendant Marquette University's motions for summary judgment are GRANTED, dismissing all six of Dr. McAdams' claims.

Dated this 4th day of May, 2017, in Milwaukee, Wisconsin.

BY THE COURT:



The Honorable David A. Hansher
Milwaukee County Circuit Court, Branch 42