SJC-13141

CHARLES M. LIEBER vs. PRESIDENT AND FELLOWS OF HARVARD COLLEGE & another.[1]

Middlesex. November 3, 2021. – January 10, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Georges, JJ.

Practice, Civil, Preliminary injunction. Corporation, Non-profit corporation, Indemnification of officers and directors. Education, Private colleges and universities. Contract, Private college, Performance and breach, Implied covenant of good faith and fair dealing. Public Policy.

Civil action commenced in the Superior Court Department on October 9, 2020.

A motion for a preliminary injunction was heard by Maureen B. Hogan, J.

The Supreme Judicial Court granted an application for direct appellate review.

David R. Suny (Andrea L. Davulis also present) for the plaintiff.

Joan A. Lukey (Justin J. Wolosz also present) for the defendants.

[1] Katherine N. Lapp.

BUDD, C.J. The plaintiff, Charles M. Lieber, appeals from the denial of a motion for a preliminary injunction, whereby Lieber sought to require his employer, President and Fellows of Harvard College,[2] to provide advancement under a written indemnification policy of counsel fees and expenses that he is incurring in defending against certain criminal charges. We conclude that the judge did not commit an abuse of discretion and affirm the denial of the motion.

1. Background. We summarize the facts, which have reasonable support in the record. See Doe v. Worcester Pub. Sch., 484 Mass. 598, 601 (2020). Since 1991, Lieber has been a professor at Harvard, where, among other things, he has served as the principal investigator of a research group funded primarily through grants from two Federal agencies, the Department of Defense (DOD) and the National Institutes of Health (NIH). When applying for and receiving those grants, Harvard and Lieber are required to make certain disclosures regarding foreign collaborations and significant financial conflicts of interest, including funds received from a foreign country.

[2] President and Fellows of Harvard College is a nonprofit Massachusetts corporation and the legal name of Harvard University. For simplicity, we refer to it as "Harvard."

According to correspondence later found on Lieber's Harvard e-mail account, between 2011 and 2013, he entered into three contracts with Wuhan University of Technology (WUT), located in the People's Republic of China (China),[3] pursuant to which he was to assemble a research team, engage in research and development, mentor students, and publish articles over periods of three to five years, in return for the payment of certain expenses and compensation, including, under two of the contracts, monthly salaries upwards of $50,000. One of the contracts related to Lieber's participation in a program designed by the Chinese government to attract foreign scientific talent, called the "Thousand Talents Plan."[4] From 2012 to as late as 2017, Lieber provided services and received payments under the WUT contracts, which, at his direction, were distributed to him by depositing one-half of the funds in a Chinese bank account set up in his name and providing the other half to him in cash when he visited China.

[3] Lieber, without authority, executed one of the contracts with Wuhan University of Technology (WUT) in Harvard's name. He also knew WUT was identifying the laboratory (lab) he helped to develop in China as a joint undertaking with Harvard. Yet, when Harvard became aware of this in 2015 and confronted him, he suggested WUT was doing so without his knowledge or assent.

[4] The contract was titled "Employment Contract of 'One Thousand Talent' High Level Foreign Expert."

Since at least 2012, Harvard, in part to bolster compliance with the disclosure requirements related to Federal grants, has had a policy requiring faculty members like Lieber to submit annual outside financial activity reports (FARs) and periodic financial conflict of interest disclosure forms (FCOIs) identifying affiliations with, and payments from, foreign sources. Between 2012 and 2019, Lieber submitted a total of seventeen FARs and FCOIs, none of which identified any contracts or affiliations with, or payments from, WUT.

In 2018, NIH and DOD, having both become aware of Lieber's apparent involvement with WUT and the Thousand Talents Plan, began inquiring whether he and Harvard had made proper disclosures in grant applications and related submissions. During an ensuing interview with DOD investigators, Lieber denied ever having been asked to participate in the Thousand Talents Plan.[5] Then, in a written response to an inquiry from NIH, Harvard, in reliance on assurances from Lieber[6] and

[5] Two days after the DOD interview, Lieber sent an e-mail message to a research associate seeking the link to a webpage where he was listed as the director of the Wuhan lab and wrote, "I lost a lot of sleep worrying about all of these things last night and want to start taking steps to correct sooner than later. I will be careful about what I discuss with Harvard University, and none of this will be shared with government investigators at this time."

[6] Harvard interviewed Lieber before preparing the letter, had him review a "near-final" draft, and copied him on the final version sent to NIH.

apparently unaware of his e-mail communications, denied he had any appointments or affiliations with WUT, other than a brief "visiting scientist appointment" in 2012,[7] and stated that WUT had falsely exaggerated his involvement with it in subsequent years. Harvard further noted in the letter to NIH that "Lieber has represented that he is not and has never been a participant in" the Thousand Talents Plan.

In 2020, Lieber was indicted in the United States District Court for the District of Massachusetts on two counts of making false statements to a government agency. According to the indictment, Lieber, as evidenced by his e-mail communications, made false statements when he separately informed, or caused Harvard to inform, DOD and NIH that he had never participated, or been solicited to participate, in the Thousand Talents Plan.[8] Subsequently, he was indicted on two counts of filing a false tax return and two counts of failing to report foreign bank and

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[7] In an FCOI submitted on July 31, 2012, Lieber disclosed that he had a "visiting scientist appointment" worth more than $10,000 with an entity he identified as the "Wuhan Institute of Technology" (WIT). After receipt of the inquiry from NIH in 2018, Lieber informed Harvard that this had been a mistake and he had meant to identify WUT, not WIT, in the FCOI. He maintained, however, that he had no further appointments or affiliations with WUT after 2012.

[8] An affidavit filed in support of the criminal charges alleges that Lieber falsely represented in the letter submitted to NIH that he had no appointments or affiliations with WUT after 2012; however, he was not charged for that alleged false statement.

financial accounts, which related to his failure to identify the payments received and a bank account he established in China in connection with the WUT contracts. Lieber pleaded not guilty to all charges.

Following his indictment, Lieber made a written request for indemnification and advance payment of his legal fees and expenses pursuant to Harvard's "Indemnification Policy." Subject to certain enumerated exclusions, the policy provides for the indemnification of "Qualified Persons"[9] against liabilities and expenses incurred in connection with, among other things, the defense of criminal proceedings the person may be involved in or threatened with by reason of serving in a "Covered Role." A "Covered Role" is "any administrative, executive, managerial, professional or fiduciary role [at Harvard], or, at the request of and for the benefit of [Harvard], in any other corporation, trust or organization." Due "to the substantial autonomy and freedom afforded to a faculty member's teaching, research and writing," however, indemnification is not extended to those activities as a "per se rule." Instead, the determination is left to Harvard's discretion, and indemnification can only be extended to such

[9] "Qualified Persons" under the policy are the "Officers of the University," which include the "teaching, professional and administrative staff."

activities when they are within the scope of the faculty member's employment. The policy also provides that Harvard shall pay the legal fees and expenses "in advance of the final disposition thereof," upon request unless "it is determined that it is reasonably likely that the person seeking indemnification will not be entitled to indemnification under th[e] policy." All "determinations" under the policy are required to be made, in "good faith discretion," by Harvard's executive vice-president.

To that end, Katherine N. Lapp, Harvard's executive vice-president, responded to Lieber's requests. With regard to the false statement charges, Lapp questioned whether Lieber was acting in a covered role at the time of the activities alleged in the indictment. Nonetheless, given that the criminal proceedings were in the earliest stages, she decided to defer the indemnification determination as to those charges. As for the second set of charges, Lapp determined that Lieber was not eligible for indemnification because, in Harvard's view, the allegations of filing false tax returns and failing to report a foreign bank account "fall outside " both the definition of a covered role and the scope of Lieber's employment.

Lapp further informed Lieber that Harvard would not provide any indemnification payments in advance because, in Harvard's view, it was "reasonably likely" that he would not be entitled

to indemnification in the final analysis. Specifically, Lapp determined that indemnification was likely to be precluded under any of a number of exceptions set forth in the policy, including where a qualified person is adjudicated or determined not to have acted in good faith or in the reasonable belief that his or her actions were in the best interests of Harvard; is adjudicated or determined to have engaged in criminal misconduct, intentional wrongdoing, recklessness, or gross negligence; or is found to have committed an act or omission that he or she knew or should have known was a violation of Harvard policies. As to the last of these exceptions, Lapp concluded that based on Lieber's contemporaneous e-mail correspondence, including his execution of the WUT contracts, it was reasonably likely he had lied or consciously withheld or misrepresented facts to Harvard and the government and failed to make required disclosures in FARs and FCOIs over multiple years, in violation of Harvard policies.[10]

Thereafter, Lieber commenced the present action, asserting claims against Harvard and Lapp for breach of contract, breach of the implied covenant of good faith and fair dealing, and

[10] Lieber's representatives made a presentation to Lapp to try to persuade her to alter her determinations, and Lieber, as was his right under the policy, then pursued an appeal from her determinations to the "Corporation," but neither step proved successful.

declaratory judgments with respect to both the failure to provide indemnification and refusal to provide advancement.[11] He also filed the motion at issue, seeking a preliminary injunction requiring Harvard to provide advancement of his legal fees and expenses. Following a nonevidentiary hearing, a judge in the Superior Court issued a written decision denying the injunction. Lieber appealed from the judge's ruling[12] and applied for direct appellate review, which we granted.[13]

2. Standard of review. "We review the grant or denial of a preliminary injunction to determine whether the judge abused [her] discretion, that is, whether the judge applied proper legal standards and whether there was reasonable support for

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[11] Two of the eight counts in the complaint were against Lapp, alleging breach of contract and seeking specific performance with respect to both indemnification and advancement.

[12] In addition to his appeal to the Appeals Court pursuant to G. L. c. 231, § 118, second par., Lieber also filed a petition seeking review in the county court pursuant to G. L. c. 211, § 3. The petition was dismissed by a single justice of this court, and that dismissal was affirmed. See Lieber v. President & Fellows of Harvard College, 488 Mass. 1015 (2021).

[13] The only claims at issue on appeal concern the advancement of indemnifiable fees and expenses. A different judge in the Superior Court has stayed Lieber's claims seeking indemnification in relation to the false statement-related charges pending resolution of those criminal charges and entered judgment on the pleadings in Harvard's favor on all claims regarding indemnification in relation to the charges alleging the filing of false tax returns and failure to report a foreign bank account. Those rulings are not before us.

[her] evaluation of factual questions." Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008), citing Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 615 (1980) (Cheney). In making our determination, we examine the same factors as the motion judge: whether the moving party has shown "that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." Doe v. Superintendent of Sch. of Weston, 461 Mass. 159, 164 (2011), citing Cheney, supra at 616-617. Where, as here, no evidentiary hearing was held and the record consists of affidavits and other documents, although "weight will be accorded to the exercise of discretion by the judge below, . . . we may draw our own conclusions from the record." Cheney, supra at 616. As always, we review questions of law de novo. See Balles v. Babcock Power Inc., 476 Mass. 565, 571 (2017) (interpretation of contract, including determination regarding ambiguity, presents question of law for court, subject on appeal to de novo review).

3. Analysis. A preliminary injunction will not be granted if the moving party cannot demonstrate a likelihood of success on the merits. See Foster v. Commissioner of Correction, 484 Mass. 698, 712 (2020) ("[T]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry. . . .

[Without it], the remaining factors become matters of idle curiosity").

Here, Lieber's success depends upon the meaning of the advancement provision in Harvard's policy, which states:

> "[Harvard] shall pay or reimburse counsel fees and other expenses reasonably incurred by a Qualified Person in defending any claim, demand, action, suit or other proceeding that may be indemnifiable under this policy in advance of the final disposition thereof, upon receipt of a written undertaking by the Qualified Person to repay all such amounts if it is ultimately determined that he or she is not entitled to indemnification hereunder. This paragraph shall not apply if it is determined that it is reasonably likely that the person seeking indemnification will not be entitled to indemnification under this policy."

Lieber contends that the second sentence of this provision, pursuant to which Lapp made her determination not to provide advancement of funds, is ambiguous and therefore should be struck. Alternatively, he argues that we should "strike" the second sentence and require Harvard to advance payments to him to cover his legal fees and expenses on "public policy" grounds. We disagree.

a. Interpretation of the policy. By statute, Massachusetts nonprofit corporations are authorized, but not required, to provide indemnification of its directors, officers, employees, and other agents "to whatever extent shall be specified in or authorized by" its articles of organization, bylaws, or a vote by a majority of the members entitled to elect its directors. See G. L. c. 180, § 6. It is under those

statutory auspices that, in 2019, Harvard adopted the indemnification policy at issue.[14]

Although regulated by statute, corporate indemnification and advancement policies are considered contractual in nature and are interpreted "according to traditional principles of contract law." Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 373-374 (2013) (Brigade).

Lieber argues that the second sentence of the advancement provision is "confusing" and "ambiguous." The sentence to which he refers, however, is entirely straightforward. It provides for the advancement of indemnifiable fees and expenses unless "it is reasonably likely that the person seeking indemnification will not be entitled to [it]." When the words of a contract are clear, they control, and we must construe them according to their plain meaning, in the context of the contract as a whole. See, e.g., Balles, 476 Mass. at 571; Brigade, 466 Mass. at 374.

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[14] Harvard, through the Sixteenth Statute of the Harvard Statutes, which it suggests are "akin to corporate by-laws," has authorized indemnification of its officers, employees, or other agents "whenever and to the extent authorized by a disinterested majority of the members of the Corporation or by a majority of the disinterested members of the Board of Overseers." The Sixteenth Statute further provides that such indemnification may include the advancement of expenses, upon receipt of an undertaking by the person indemnified to repay such amounts if it is ultimately determined that he or she is not entitled to indemnification. It was based on this authority that Harvard adopted the policy at issue.

Here, Lieber's request for advancement of indemnifiable fees and expenses has been denied, as Harvard has determined that it is reasonably likely that, when all is said and done, he will be found to be ineligible for indemnification.[15] Contrary to Lieber's suggestion, that determination was made consistent with the plain meaning of the policy.

b. "Public policy" arguments. Alternatively, Lieber argues that the second sentence of the advancement provision must be struck because it violates "strong public policies" favoring advancement and the protection of his rights under the Fifth and Sixth Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. This argument, too, misses the mark.

If a court determines that a contract violates public policy, "it has discretion to determine the rights and liabilities of the parties as a matter of law." Massachusetts

[15] We note that Lieber argues not that the sentence is susceptible of more than one interpretation, which is the classic definition of contract ambiguity, see Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 373-374 (2013), but instead that the sentence is confusing and therefore should be struck. Even if the sentence was unclear, which, as noted supra, it is not, it is a fundamental principle of interpretation "that every word and phrase of an instrument is if possible to be given meaning, and none is to be rejected as surplusage if any other course is rationally possible." Balles v. Babcock Power Inc., 476 Mass. 565, 575 n.17 (2017), quoting Tupper v. Hancock, 319 Mass. 105, 109 (1946).

Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39, 55 (1991), citing Town Planning & Eng'g Assocs., Inc. v. Amesbury Specialty Co., 369 Mass. 737, 745–747 (1976). "Under freedom of contract principles, [however], parties are held to the express terms of their contract, and the burden of proof is on the party seeking to invalidate an express term." TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 430 (2006). Here, Lieber has not satisfied that burden.

Lieber first argues that allowing Harvard to refuse to provide advancement based on a preliminary assessment of his entitlement to indemnification is inconsistent with the primary purpose of advancement, which he suggests is to convey "to an institution's most valuable and talented people" that the school will stand behind them when their honesty or integrity is challenged. As a general proposition, that may be true, see Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005) ("Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service"), and it would seem to be in a corporation's self-interest to consider that as it endeavors to compete for talented employees. As noted above, however, in Massachusetts an entity like Harvard has broad statutory authority when it comes to providing indemnification. See G. L. c. 180, § 6. Harvard has taken that authority and adopted an

indemnification policy that affords it a fair amount of discretion when it comes to making certain determinations, including when it comes to the advancement of fees and expenses. That may or may not be in Harvard's best interest, but Lieber has failed altogether to establish that it violates public policy, such that we could impose mandatory advancement on the school against its clearly stated will.

The same is true with respect to Lieber's argument that the advancement provision is inconsistent with his constitutional rights not to incriminate himself and to retain counsel to defend himself against the criminal charges. Take the former, for example. Lieber argues that he has been unable to dispute the facts upon which Lapp relied in making her advancement determination and upon which the motion judge relied in concluding that he was unlikely to succeed on the merits of his claims[16] out of fear of waiving his right against self-incrimination, and that this is something he should not be penalized for doing. There is no doubt that parallel civil and

[16] Lieber suggests, in conclusory fashion, that the affidavits considered by the motion judge were "rife" with inadmissible evidence and should not have been considered. However, the affidavits were not intended to be definitive proof that Lieber is guilty of the criminal charges or that he violated school policies. Instead, they were submitted to establish that Lapp did not abuse her discretion when she made her determination regarding the advancement of fees to Lieber. The evidence Lapp chose to consider was not subject to the rules of evidence.

criminal proceedings can "place significant burdens upon the . . . privilege against self-incrimination." Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 97 (2d Cir. 2012). "[N]ot every undesirable consequence which may follow from the exercise of the privilege against self-incrimination[, however,] can be characterized as a penalty." Flint v. Mullen, 499 F.2d 100, 104 (1st Cir.), cert. denied, 419 U.S. 1026 (1974). This is particularly true in a civil context like the present one, where, pursuant to the clear language Harvard chose to include in the indemnification policy, both parties have rights. See Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996) ("in the civil context, where, systemically, the parties are on a somewhat equal footing, one party's assertion of his constitutional right should not obliterate another party's right[s]"). "To hold otherwise would, in terms of the customary metaphor, enable [Lieber] to use his Fifth Amendment shield as a sword. This he cannot do." Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1087 (5th Cir. 1979). At the very least, he has failed to establish that he is entitled to do so as a matter of public policy.[17]

[17] Lieber also argues that he had a reasonable expectation that his plea of not guilty would not be ignored and that the criminal allegations would not be used against him by Harvard in making the advancement determination, and that by violating those expectations the school committed a breach of the implied covenant of good faith and fair dealing. The implied covenant,

4. Conclusion. Considering the unambiguous language of the advancement provision in Harvard's indemnification policy and the reasonably supported facts in the record, particularly those supported by Lieber's own e-mail communications, we conclude that the motion judge did not abuse her discretion when she concluded that Lieber has not established a likelihood of success on the merits of his claims seeking advancement of fees and expenses.[18] The motion for a preliminary injunction, therefore, was properly denied.

Order denying motion for a preliminary injunction affirmed.

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however, "is only as broad as the contract that governs the particular relationship. It cannot create rights and duties not otherwise provided for in the existing contractual relationship, as the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance" (quotations and citations omitted). T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 570 (2010). Given the plain language of Harvard's policy, therefore, Lieber's claim for breach of the implied covenant of good faith and fair dealing is, to borrow the words of the motion judge, "equally unsupported."

[18] As Lieber has not established a likelihood of success on the merits of his action, we need not reach the issue of irreparable harm. See Foster v. Commissioner of Correction, 484 Mass. 698, 712 (2020).