No. ____

SUPREME COURT OF THE UNITED STATES

MEHDI MOINI,

Petitioner,

vs.

ELLEN M. GRANBERG,
In her official capacity as President,
George Washington University,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

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Pro se

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JUDGMENT OF THE UNITED STATES COURTS OF APPEALS FOR THE DC CITCUIT AFFIMING MAY 13, 2022 ORDER OF THE DISTRICT COURT (May 1, 2024)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 22-7101 September Term, 2023
FILED ON: MAY 1, 2024

MEHDI MOINI,
APPELLANT

v.

ELLEN M. GRANBERG, IN HER OFFICIAL CAPACITY AS PRESIDENT, GEORGE WASHINGTON UNIVERSITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-03126)

Before: SRINIVASAN, *Chief Judge*, RAO and PAN, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties and court-appointed amicus. The Court has accorded the issues full consideration and has

determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is:

ORDERED that the order of the district court, entered on May 13, 2022, is **AFFIRMED.**

* * *

Dr. Mehdi Moini, an Iranian chemist, was a professor at George Washington University ("GW" or "the University") who was denied tenure. He sued the University alleging racial discrimination and breach of contract in his tenure process. The district court granted the University's motion for summary judgment. On appeal, court-appointed amicus argues for the first time that the University denied Dr. Moini tenure in retaliation for a prior discrimination lawsuit that he filed against a past employer. We hold that the retaliation claim is forfeited because it was not raised below and affirm the district court's grant of summary judgment on the discrimination and contract claims.

I.

Dr. Moini began working at GW in January 2014.[1] He was hired as a tenure-track associate professor of forensic chemistry in the Department of Forensic Sciences (the "Department"), within the Columbian College of Arts and Sciences ("the College"). GW put Dr. Moini on a "fast track" to tenure due to his prior experience, which entitled him to receive a tenure decision within three-and-a-half years, rather than the usual seven. Dr. Moini

[1] The named defendant is Ellen Granberg, the current President of GW. Throughout the opinion, we refer to the University as the defendant, as Dr. Moini alleged in his complaint.

previously had worked at the University of Texas at Austin ("UT Austin"). When his contract with UT Austin was not renewed in 2008, he sued that university for national-origin, age, and race discrimination. *See Moini v. Univ. of Tex. at Austin*, 2010 WL 11677609, at *2 (W.D. Tex. Oct. 7, 2010); *Moini v. Univ. of Tex. at Austin*, 832 F. Supp. 2d 710, 714 (W.D. Tex. 2011).

In June 2015, GW amended its Faculty Code to require tenure applicants to demonstrate "excellence" in teaching. Previously, the Faculty Code had required only "professional competence" in teaching. Starting in the Fall 2015 semester, students could evaluate teachers individually. Before submitting his tenure application, Dr. Moini received individual evaluations in four courses at GW. In student evaluations for three out of those four courses, his "overall rating of the instructor" fell below the Department average.

Dr. Moini applied for tenure in September 2016. Due to concerns about his teaching record, the Department initially was unwilling to vote in favor of tenure and instead sought to secure an extension of the tenure clock to give him more time to demonstrate teaching excellence. After higher-level University leaders denied that request, however, the Department voted unanimously in favor of tenure. The College's tenure committee, the Dean of the College, and the Provost all disagreed with the Department's recommendation, finding that Dr. Moini's application lacked evidence of teaching excellence. The Faculty Senate Executive Committee then found that there were "extenuating circumstances" that made Dr. Moini's teaching environment difficult and recommended that Dr. Moini's tenure clock be extended by two years so that

he could improve his teaching. But then-GW President Steven Knapp disagreed. He stated that Dr. Moini had spent two decades teaching at institutions in Texas, and he therefore had ample time "to develop his teaching skills in advance of arriving at GW." J.A. 473. After President Knapp's determination, Provost Forrest Maltzman informed Dr. Moini that he would be denied tenure.

Dr. Moini then embarked on an extensive internal grievance process at GW. His efforts ultimately were unsuccessful. Although an Appeals Panel found that it was arbitrary to deny Dr. Moini tenure "based solely on student evaluations of a one-credit hour required seminar course," the Panel's determination was overruled by Provost Maltzman. J.A. 626–27. Provost Maltzman found compelling reasons to non-concur with the Appeals Panel decision, again citing the excellence-in-teaching standard. The Executive Committee of the Board of Trustees voted to uphold the university's decision against tenure, conclusively resolving the issue against Dr. Moini. Dr. Moini's employment with GW ended in September 2018.

Dr. Moini filed his pro se complaint in the district court in October 2019. In April 2020, the district court dismissed Dr. Moini's Title VII and D.C. Human Rights Act claims as time-barred. After discovery, both parties cross-moved for summary judgment on the remaining claims. The district court granted the University's motion for summary judgment and denied Dr. Moini's cross-motion. Dr. Moini appealed. We appointed amicus to submit briefing in support of Dr. Moini's position on certain issues.[2]

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[2] We directed the amicus and the parties to brief:

II.

We review the district court's grant of summary judgment de novo. *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1113 (D.C. Cir. 2016). To prevail on a motion for summary judgment, a party must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriately granted when, viewing the evidence in the light most favorable to the non-movants and drawing all reasonable inferences accordingly, no reasonable jury could reach a verdict in their favor." *Lopez v. Council on Am.-Islamic Rels. Action Network, Inc.*, 826 F.3d 492, 496 (D.C. Cir. 2016). While we generally construe pro se plaintiffs' pleadings more liberally, pro se plaintiffs are held to the same evidentiary burdens as those represented by counsel at summary judgment. *See Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 397 (D.C. Cir. 2020) ("While we liberally construe pro se pleadings, pro se litigants do not have a license to ignore the Federal Rules of Civil Procedure." (cleaned up)); *see also Prunté v. Universal Music Grp.*, 699 F. Supp. 2d 15, 21–22 (D.D.C. 2010) (quoting *Laningham v. U.S. Navy*, 813

> (1) whether "Middle Eastern" is a race for the purpose of a claim under 42 U.S.C. § 1981, and if so, whether a reasonable jury could conclude that appellant is a member of such a race; and (2) whether a plaintiff advancing a claim under § 1981 based on alleged employment discrimination is required to establish a breach of contract.

Per Curiam Order Appointing Amicus, No. 22-7101 (May 8, 2023). We do not decide those questions in our disposition of this case.

F.2d 1236, 1242 (D.C. Cir. 1987)), *aff'd*, 425 F. App'x 1 (D.C. Cir. 2011).

III.

On appeal, Dr. Moini and court-appointed amicus collectively present three types of claims: a § 1981 discrimination claim, a § 1981 retaliation claim, and contract claims rooted in District of Columbia law. The record shows no dispute of material fact as to the first and third of those claims and the retaliation claim is forfeited. Accordingly, we affirm the district court's grant of summary judgment.

A.

Under 42 U.S.C. § 1981, a plaintiff may bring suit when their right to make and enforce contracts is impaired by racial discrimination. Dr. Moini brought a § 1981 claim for disparate treatment, which requires him to identify evidence that the University intentionally discriminated against him on the basis of race. *See Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 n.1 (D.C. Cir. 2013) (per curiam).

A plaintiff can prove intentional discrimination through direct or indirect evidence. Direct evidence includes any statement that "itself shows racial . . . bias in the [employment] decision." *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011). Dr. Moini has not identified such a statement. Before the district court, he cited comments by Dr. Walter Rowe that allegedly denigrated immigrants and foreigners. Such general remarks, however, do not show "bias in the [employment] decision." *Id.*

Absent direct evidence, we assess indirect evidence of racial discrimination under the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973); *see also Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014) (explaining that *McDonnell Douglas* applies to § 1981 claims). When an employer offers a legitimate, nondiscriminatory reason for an allegedly discriminatory employment action, we "need not — and should not — decide whether the plaintiff actually made out a prima facie case" of discrimination. *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (emphasis omitted). Instead, our task is to "resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race . . . ?" *Id.*

Here, the University provided a legitimate, nondiscriminatory reason for denying Dr. Moini tenure: his failure to demonstrate teaching excellence. During Dr. Moini's tenure process, multiple reviewers cited his below-average teaching-evaluation scores and his students' negative comments about him as the reason for denying tenure. The Chair of the College's tenure committee noted that Dr. Moini's "teaching record falls well below [w]hat we would expect from our tenured colleagues." J.A. 425. Dean Ben Vinson noted that student comments "complained of overwhelming material, lack of organization, poor pace, and quizzes that seemed more like tests." *Id.* at 428. In short, GW provided sufficient evidence to establish that there is no genuine dispute about whether Dr. Moini

was denied tenure because he did not meet the University's teaching standards.

Dr. Moini attempts to show that GW's cited rationale was pretextual based on asserted deviations from the University's established procedures for evaluating tenure applications. But none of the alleged irregularities supports an inference of racial discrimination. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("An employer's failure to follow its own regulations and procedures, alone, may not be sufficient to support the conclusion that its explanation for the challenged employment action is pretextual." (internal quotations omitted)).

First, Dr. Moini argues that the Department Chair, Dr. Rowe, deviated from established procedures for assigning courses and for readying a candidate to apply for tenure. Dr. Moini contends that Dr. Rowe set him up to fail by assigning him to teach a graduate seminar course with a history of low student evaluations. He also emphasizes that Dr. Rowe failed to provide him with a mid-tenure review and never informed him about the concerns with his teaching. Dr. Moini's accusations against Dr. Rowe are unpersuasive. Dr. Rowe strongly supported Dr. Moini's tenure application, urging the Faculty Senate to look past Dr. Moini's negative reviews and vouching that his teaching was "clear and concise." J.A. 442. The evidence therefore does not support an inference that Dr. Rowe harbored racial animus against Dr. Moini or sought to sabotage his application for tenure. Moreover, Dr. Moini has not shown that the University's consideration of student evaluations was a deviation from its usual practice when making tenure decisions. *See* J.A. 272 ("Evidence of effective

teaching . . . shall include . . . written evaluation[s] by students."). Finally, the decision not to provide Dr. Moini with an official mid-tenure review was made by Dr. Victor Weedn, the preceding Department Chair, based on a representation by Associate Dean Eric Arnesen that such reviews were not necessary for fast-track faculty. Dr. Moini has made no allegations of racial discrimination against Dr. Weedn or Dean Arnesen.

Second, Dr. Moini alleges that non-Middle Eastern professors were treated differently in the tenure process, citing three professors from other departments who received tenure despite receiving teaching evaluations below their departmental averages. To establish that another employee is an appropriate comparator, "[a] plaintiff must . . . demonstrate that all of the relevant aspects of his employment situation were nearly identical to those of the other employee." *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015) (cleaned up). As the district court observed, the proposed comparators differed in the timing of their tenure decisions, the composition of their teaching loads, and the discernable upward trajectory in their student evaluations.[3]

B.

[3] Dr. Moini argues that Dr. Rowe is another relevant comparator because he co-taught the Graduate Seminar and also received poor student evaluations. Despite these evaluations, Dr. Rowe was promoted to Department Chair. Dr. Rowe is an inappropriate comparator, however, because the criteria for selection of a Department Chair are fundamentally different from those for granting tenure. The role of the Chair is administrative in nature.

Section 1981's implied cause of action also encompasses retaliation claims. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 446 (2008). But Dr. Moini has forfeited any § 1981 retaliation claim he may have had by failing to raise it in his complaint. *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003) (declining to address the merits of an argument "raised for the first time on appeal"). In the complaint, Dr. Moini does not mention that he previously sued UT Austin for racial discrimination, much less argue that he was denied tenure at GW because of it. While we construe a pro se plaintiff's pleading more leniently than one drafted by lawyers, we cannot supply a cause of action that the plaintiff did not plead. *Bowman v. Iddon*, 848 F.3d 1034, 1040 (D.C. Cir. 2017) ("Even construing the complaint liberally, as we must, it contains nothing resembling the claim amicus asserts.").

Amicus argues that we can find a retaliation claim in Dr. Moini's complaint because it asked the court to "enjoin Defendant from any further acts of discrimination and/or *retaliation* against Plaintiff." J.A. 112 (emphasis added). But that single word is insufficient to plead a retaliation claim based on Dr. Moini's suit against UT Austin. The complaint, read as a whole, is clear: Dr. Moini sued GW for race discrimination, not retaliation due to a past lawsuit. Amicus also argues that Dr. Moini made a retaliation claim in his summary-judgment briefing. While it is true that Dr. Moini referenced events related to his UT Austin lawsuit in his Statement of Undisputed Facts, the district court was not required to infer new legal claims from such factual references. *See Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988).

C.

Finally, Dr. Moini's contract claims lack merit. Breach of contract claims are assessed under D.C. law and require: "(1) a valid contract . . . ; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). Dr. Moini presents six contract-based arguments on appeal — but none of them adequately raise a factual dispute about a breach of contract by the University.

First, Dr. Moini's claim about mid-tenure review is time-barred. A breach of contract action must be brought within three years of the time of breach. *Mawakana v. Bd. of Trustees of the Univ. of D.C.*, 926 F.3d 859, 868 (D.C. Cir. 2019). The College's procedures state that the review should occur "at the approximate mid-point of the period leading to [the] tenure review and decision." J.A. 155. The approximate mid-point of Dr. Moini's tenure track was around October 2015, more than three years prior to the filing of the complaint in October 2019. *Mawakana*, 926 F.3d at 868.

Next, Dr. Moini's contract claims based on Dr. Rowe's selection as Department Chair were not raised before the district court and are now forfeited. *See Kingman Park Civic Ass'n*, 348 F.3d at 1039. Although Dr. Moini discussed Dr. Rowe's selection as Department Chair as a comparator for his racial-discrimination claim, he did not allege that Dr. Rowe's selection as Department Chair constituted a breach of the Department Constitution.

The remainder of Dr. Moini's claims also are unavailing. Dr. Moini fails to create a genuine

dispute about whether Dr. Rowe had any contractual obligation to inform him of the Department's initial negative tenure vote in December 2016. That vote was superseded by the Department's unanimous vote in favor of his tenure. Dr. Moini also fails to create a genuine dispute about whether Provost Maltzman did not appropriately apply the "compelling reasons" standard when non-concurring with the Department or the Appeals Panel's decisions. In fact, Provost Maltzman specifically explained that the "compelling reasons" to deny tenure related to Dr. Moini's failure to demonstrate teaching excellence. J.A. 440, 628. Dr. Moini also alleges that Vice Provost Christopher Bracey and the Hearing Panel members engaged in inappropriate *exparte* communications during the grievance process, but the referenced emails only discussed the privacy interests of academic reviewers. Those exchanges did not relate to the substance of the tenure review and did not violate the Faculty Code. J.A. 316 ("Members of the Hearing Committee . . . shall avoid ex parte communications bearing on the substance of the dispute."). Finally, Dr. Moini has failed to provide any evidence demonstrating that members of the GW administration colluded or conspired against him in their decision to deny tenure.

IV.

There is no genuine dispute of material fact about Dr. Moini's § 1981 discrimination claim or his contract claims. We therefore affirm the district court's order granting summary judgment to the University.

* * *

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

ORDER OF THE UNITED STATES COURTS OF APPEALS FOR THE DC CITCUIT DENYING PETITIONER'S PETITION FOR PANEL REHEARING (JUNE 12, 2024)

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7101 September Term, 2023
1:19-cv-03126-TNM
Filed On: June 12, 2024

Mehdi Moini,

Appellant

v.

Ellen M. Granberg, In her Official Capacity as President, George Washington University,

Appellee.

PER CURIAM O R D E R [2059321] filed denying petitioner's sealed petition for panel rehearing. [2057308-2]. **BEFORE:** Srinivasan, Chief Judge; Rao and Pan, Circuit Judges. [22-7101]

ORDER OF THE UNITED STATES COURTS OF APPEALS FOR THE DC CITCUIT DENYING PETITIONER'S PETITION FOR REHEARING EN BANC

(JUNE 12, 2024)

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7101 September Term, 2023
1:19-cv-03126-TNM
Filed On: June 12, 2024

Mehdi Moini,

Appellant

v.

Ellen M. Granberg, In her Official Capacity as President, George Washington University,

Appellee.

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker*, Childs, Pan, and Garcia, Circuit Judges.

ORDER

Upon consideration of petitioner's sealed petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judges Katsas and Walker did not participate in this matter.

Opinion and Order of the United States District Court for the District of Columbia Denying in Part and Granting in Part Defendant's Motion to Dismiss (April 24, 2020)

United States District Court, District of Columbia

MEHDI MOINI,

Plaintiff,

v.

THOMAS J. LEBLANC, in his official capacity as President, George Washington University,

Defendant.

1:19-cv-03126 (TNM)
04-24-2020

MEMORANDUM OPINION AND ORDER

George Washington University (the "University") denied tenure to Mehdi Moini, Ph.D. Moini, proceeding *pro se,* alleges that this decision violated Title VII of the Civil Rights Act of 1964 ("Title VII"), the D.C. Human Rights Act ("DCHRA"), and 42 D.S.C. § 1981. He also claims that the University breached its contractual obligations. University President Thomas J. LeBlanc ("the President") moves to dismiss the Complaint. The Court finds that Moini's claims under Title VII and

the DCHRA are time-barred, so it will dismiss them. But the Court will not dismiss his other claims. Given the liberal pleading standards for *pro se* plaintiffs, Moini has alleged enough facts at this stage to proceed with his § 1981 claim and his contract claims. The Court will thus grant in part and deny in part the President's motion to dismiss.

I.

Moini describes himself as "a Middle Eastern (Iranian)" individual. Compl. ¶ 5, ECF No.1. He holds a doctorate in chemistry from Michigan State University. *Id.* ¶ 24. From 1987 to 2014, he held several academic and research positions, including at the Smithsonian Institution. *Id.;* Compl. Exs. at 282,[4] ECF No. 1-5. He joined the faculty of George Washington University in 2014 as a tenure-track associate professor in the Department of Forensic Sciences. Compl. ¶ 25. The appointment was for a period of three and a half years, so he would receive a tenure decision no later than June 2017. *Id.*

In accepting the position, Moini agreed to "the conditions stated in the Faculty Code and Faculty Handbook." *Id.* , ¶ 12. The Code contains the criteria for tenure. *Id.* ¶ 13. As of 2015, it provided that "tenure is reserved for members of the faculty who demonstrate excellence in scholarship, teaching, and engagement in service and who show promise of continued excellence." *Id.* The lynchpin of this case is the "excellence in teaching" criterion.

[4] All page citations refer to the page numbers that the *CMIECF* system generates.

Moini alleges that he built a strong record in all areas-scholarship, teaching, and service. *Id.* ¶¶ 28-30. For example, he published nine peer-reviewed papers, collaborated with federal agencies, and gave presentations at local schools. *Id.* ¶¶ 28-29. And many colleagues and students have praised his teaching. *Id.* ¶ 30. But he acknowledges that student evaluations from a graduate seminar he taught were "relatively poor" and "below departmental averages." *Id.* ¶¶ 2, 31.

This seminar is mandatory for graduate students, and Moini describes it as "quite demanding." *Id.* ¶¶ 2, 10. For a time, he co-taught the course with a colleague, Professor Rowe, who "received similar negative student evaluations." Id. ¶ 31. Soon after Rowe stepped down as a co-instructor, he received a promotion to Department Chair. *Id.* ¶¶ 26,33.

Moini submitted his tenure application in September 2016, which triggered a multi-step review process. *Id.* ¶¶ 17, 32. First, a committee of tenured faculty in the Department of Forensic Sciences "unanimously" recommended tenure. *Id.* ¶ 35. This recommendation went to the Personnel Committee for the University's College of Arts and Sciences. *Id.* ¶ 36. The Personnel Committee was to provide its "independent concurrence or nonconcurrence" with the Department's recommendation and to identify any "compelling reasons" for nonconcurrence. Compl. Exs. at 29. It voted five to two *against* tenure, with two abstentions. Compl. ¶ 37. According to Moini, the Committee focused on the negative student evaluations from his graduate seminar. *Id.*

The next stop was the Dean of the College of Arts and Sciences. *Id.* Like the Personnel Committee, he disagreed with the Department's

recommendation of tenure. *ld.* The Dean allegedly cited "a disaffected student's unhappy reaction to the [graduate seminar] as the deciding piece of evidence that Moini lacks excellence as a teacher." *Id.* (quoting Compl, Exs. At 9).

The Provost also disagreed with the Department's recommendation of tenure. *ld.* He concluded that Moini had "not yet achieved the teaching standard commensurate with a ... grant of tenure." *Id.* ~ 38. (quoting Compl, Exs. at 3).

Since the Provost did not concur with the Department's recommendation, he referred the matter to the Executive Committee of the Faculty Senate. *Id.;* Compl. Exs. at 39. This body voted against tenure, too. Cornpl. ¶ 39. Finally, the University President reviewed Moini's case for a "final decision." *Id.* ¶ 37; Compl. Exs. at 39-40. He decided against tenure. Compl. ¶ 37.

So, after six of levels of review, one body-the Departmental Committee-recommended tenure. The subsequent five reviewers-the College's Personnel Committee, the Dean, the Provost, the Executive Committee of the Faculty Senate, and the President-did not. The Provost informed Moini by letter dated June 22, 2017, that "the decision ha[d] been made not to extend tenure" to him. Compl. Exs. at 5. The letter also stated that Moini's appointment for the 2017-2018 academic year would be "a terminal one." *Id.*

Moini soon began a grievance process. Compl. ¶ 41. He first sought an informal resolution. *Id.;* Compl. Exs. at 44. The University offered to extend Moini's appointment by one semester, but Moini rejected this and brought a formal grievance. Compl. ¶ 41.

He made two allegations. First, he claimed that the University had violated the Faculty Code because it did not give him "sufficient notice" that his student evaluations were poor enough to put his tenure at risk. *Id.* Second, he complained that the denial of tenure was "arbitrary and capricious" because it was "primarily based on student evaluations of a one-credit graduate seminar course, ignoring all other teaching metrics." *Id.* ¶ 43.

A three-member Hearing Panel reviewed Moini's grievance and upheld the denial of tenure by a split vote. *Id.* ¶ 44. For the panel majority, while there was "no serious challenge to his record of research and scholarship," his teaching was "short of excellent." Compl. Exs. at 6. Based "primarily" on the student evaluations from Moini's graduate seminar, the Panel concluded that he had "not demonstrated a readiness to adapt his teaching to the students he actually has." *Id.* The dissenting member criticized the heavy reliance on the student evaluations. *Id.* at 7-9. He cited the College's own memorandum of guidance stating that "[s]tudent evaluations ... are an imperfect tool for measuring teaching evidence and quality."
Id. at7.

An Appeals Panel unanimously reversed the Hearing Panel's decision, finding it "seriously erroneous." Compl. ¶ 46; Compl. Exs. at 53. In its view, the denial of tenure was "arbitrary and capricious" because it was "based solely on student evaluations of a one-credit hour required seminar course, with no other supporting documentation." Compl, Exs. at 54. The record, it noted, included "letters from Dr. Moini' s graduate students who secured good jobs upon graduation, praising Dr. Moini, along with acceptable student evaluations

from [his] other courses, and favorable peer reviews of his teaching." *Id.* So the Appeals Panel recommended granting him tenure. *ld.* at 53.

But that was not the end. The Provost has authority to reject the recommendation of the Appeals Panel, and he did so here. Compl. ~ 49. Among the "compelling reasons" for doing so was the Code's "excellence in teaching" standard, which, in his view, the Appeals Panel had not applied correctly. Compl. Exs. at 687-91.

The Provost then forwarded Moini's grievance to the University's Board of Trustees for the final say. Compl. ¶ 53. The Board "voted to uphold the university's decision against tenure." Compl. Exs. at 760. The University informed Moini of the Board's decision on September 19, 2018. *Id.*

The next year, on April 14, Moini sent an "initial inquiry" to the Equal Employment Opportunity Commission ("EEOC"). *ld.* at 763. He then filed a formal Charge of Discrimination on July 12. Def.'s Mem. in Supp. of Mot. to Dismiss at 50 ("Def.'s Mem."), ECF No. 6-1. He alleged that the University had discriminated against him based on "national origin." *ld.* at 51. The EEOC soon mailed him a Notice of Right to Sue, Compl. Exs. at 772, which he received on July 19, Compl. ¶ 55.

Within three months, Moini sued. He claims violations of Title VII and the DCHRA (Count I), as well as 42 U.S.C. § 1981 (Count III). *Id.* ¶¶ 84, 88. He also alleges that the University "breached its contractual obligations" by denying him tenure "without providing him notice of putative concerns regarding his teaching." *Id.* ¶ 86 (Count II). For the same reason, he asserts that the University "breached the implied covenant of good faith and fair

dealing" (Count IV). *Id.* 90.[5] He seeks reinstatement, tenure, back pay, and damages. *Id.* at 42-43.

II.

The President moves to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). Def.?s Mot. to Dismiss at I, ECF No.6. To survive this motion, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In assessing plausibility, the Court may consider only "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." *Hurdv. District of Columbia,* 864 F.3d 671, 678 (D.C. Cir. 2017). And it must generally "accept as true all of the complaint's factual allegations and draw all reasonable inferences in favor of the plaintiff]']." *Owens* v. *ENP Paribas, SA.,* 897 F.3d 266, 272 (D.C. Cir. 2018). But the Court need not accept a complaint's factual allegations "insofar as they contradict exhibits to the complaint." *Id.* at 272-73. Nor need it credit legal conclusions couched as factual allegations. *Id.* at 272.

The Court is mindful that Moini is proceeding without counsel. "A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent

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[5] The Court has federal-question jurisdiction over Moini's claims under Title VII and 42 U.S.C. § 1981. 28 U.S.C. § 133l. It has supplementaljurisdiction over his DCHRA claim and his contract claims. *Id.* § 1367(a).

standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (cleaned up). More, the Court must assess *a pro se* complaint "in light of all filings, including filings responsive to a motion to dismiss." *Brown* v. *Whole Foods Mkt. Grp., Inc.,* 789 F.3d 146, 152 (D.C. Cir. 2015) (cleaned up).

III.

A.

The President contends that Moini's claims under Title VII and the DCHRA (Count I) are untimely. Dismissal on this basis is appropriate when a claim is "conclusively time-barred" on the face of the Complaint. *Firestone* v. *Firestone,* 76 F.3d 1205, 1209 (D.C. Cir. 1996). That is the case here. Indeed, the timing issue largely comes down to the proper application of a Supreme Court decision.

Start with Title VII. To sue under this statute, an individual must first file a charge with the EEOC "within [180] days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(l). This limitations period extends to 300 days if the individual "has initially instituted proceedings with a State or local agency." *Id.*

The first question-which turns out to be dispositive here-is when "the alleged unlawful employment practice occurred." The President argues that it occurred on June 22, 2017, when the Provost informed Moini of the decision to deny him tenure and that his appointment for the 2017-2018 academic year would be terminal. Def.' s Mem. at 28. Moini points instead to September 19, 2018, when the Board of Trustees made a final decision on his

grievance. Pl.'s Opp'n at 27, ECF No.8. Under *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980), he is mistaken.

Ricks bears striking similarities to Moini's case. Just consider the question presented: "whether respondent, a college professor, timely complained under the civil rights laws that he had been denied academic tenure because of his national origin." *Id.* at 252. The Tenure Committee at Delaware State College twice voted to deny tenure. *Id.* The Faculty Senate upheld the decision. *Id.* And in March 1974, the College's Board of Trustees "formally voted to deny tenure." *Id.*

Unhappy with this decision, Ricks filed a grievance with the Board's Educational Policy Committee. *Id.* Meanwhile, the Board informed him on June 26, 1974, that "he would be offered a I-year 'terminal' contract that would expire June 30, 1975." *Id.* at 252-53. It referenced the pending grievance, explaining that if the Educational Policy Committee recommended granting tenure-and if the Board agreed with the recommendation-then Ricks would get tenure after all. *Id.* at 253 n.2. But three months later, the Board notified Ricks that "it had denied his grievance." *Id.* at 254. Ricks filed a charge with the EEOC in April 1975. *Id.* He then sued, bringing a Title VII claim. *Id.* Ruling on a motion to dismiss, the district court held that this claim was untimely. *Id.* at 254-55. The limitations period began to run on June 26, 1974, and Ricks had filed his EEOC charge more than 300 days after that date. *Id.* at 255,260 n.13.

The Supreme Court agreed, reversing the Third Circuit's contrary ruling. *Id.* at 256. The first task was to identify "the alleged unlawful employment practice." *Id.* at 257. It concluded that

Ricks alleged unlawful denial of tenure, not unlawful termination of employment. *Id.* At *257-58; see also id.* at 262-63 (Stewart, L, dissenting) (agreeing with the majority "that the unlawful employment practice alleged in the ... complaint was a discriminatory denial of tenure, not a discriminatory termination of employment").

To plead the latter, Ricks would have needed to allege that the College terminated him in a discriminatory manner relative to other professors who had been denied tenure. *Id.* at 258 (majority opinion). But he did not. *Id.* Indeed, Ricks's termination was simply an "inevitable ... consequence of the denial of tenure." *Id.* at 257-58. So Title VII's clock began not when this *consequence* came to pass, but "at the time the tenure decision was made and communicated to Ricks." *Id.* at 258.

The next task was to identify this date. *Id.* at 259. It came down to two candidates. One option was September 12, 1974, when "the Board notified Ricks that his grievance had been denied." *Id.* at 260. The other option was June 26, 1974, when "the Board notified Ricks that he would be offered a 'terminal' contract for the 1974-1975 school year." *Id.* at 261-62.[6] The Court rejected the September 12 date for

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[6] The Board informed Ricks of the decision to deny tenure *earlier* than June 26. 449 U.S. at 252. June 26 was when it offered him a "terminal" contract. *Id.* at 253. The Court did not have to consider the pre-June 26 date since even June 26 was more than 300 days before Ricks filed his EEOC charge. *Id.* at 260 n.13, 262 n.17. Here, the University informed Moini on the *same day* that (1) it had denied him tenure and (2) his appointment for the upcoming academic year would be "terminal." Compl. Exs. at 5. That day was June 22, 2017. *Id.* So this June 22 date is equivalent to the June 26, 1974, date in *Ricks*.

the June 26 date. In support of the September 12 date, the EEOC, as *amicus,* offered two arguments. *Id.* At 260. First, it urged that the decision to deny tenure "was only an expression of intent that did not become final until the grievance was denied." *ld.* Indeed, the June 26 letter "explicitly held *out"* the possibility that Ricks "would receive tenure if the Board sustained his grievance." *Id.* The Court acknowledged this. *Id.* at 261. But it still found that "[e]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative." *Id.* More, "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.*

The EEOC also maintained that "the pendency of the grievance period should toll the running of the limitations period[]." *Id.* But this argument failed too. It was settled that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period[]." *Id.*

So for these reasons, September 12-the day that Ricks received a final decision on his grievance-was *not* when Title VII's limitations period began to run.

Turning to the June 26 date, the Court observed that by then, "the tenure committee had twice recommended that Ricks not receive tenure; the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny Ricks tenure." *Id.* at 262. "In light of this unbroken array of negative decisions," the district court "was justified in concluding that the College had established its official position-and made that position apparent to

Ricks-no later than June 26, 1974." *Id.* His EEOC charge was thus untimely, since he filed it more than 300 days after June 26. *Id.* at 260 n.13.

Ricks governs here. The only unlawful employment practice that Moini alleges is the denial of tenure. Compl. ¶ 1; *see* Pl.'s Opp'n at 40. He does not allege unlawful termination of employment, since he does not claim that the University terminated him in a discriminatory manner relative to other professors who had been denied tenure. *See* Pl.'s Opp'n at 16,26-27; *Ricks,* 449 U.S. at 258. So Title VII's clock began to run "at the time the tenure decision was made and communicated to [Moini]." *Ricks,* 449 U.S. at 258.

That occurred on June 22, 2017, when the Provost notified Moini that "the decision has been made not to extend tenure" and that his appointment for the 2017-2018 academic year would be "terminal." Compl. Exs. at 5; *see Ricks,* 449 U.S. at 261-62 & n.17. By June 22, five reviewers had decided against tenure, including the University President, whose decision on the matter is "final," per the Faculty Code. Compl. Exs. at 40. So the University had established its "official position" by this date. 449 U.S. at 262; *see supra* note 3 (noting the equivalency between the June 22,2017, date in Moini's case and the June 26, 1974, date in *Ricks).*

This is so even though Moini filed a grievance challenging the tenure decision. *See Ricks,* 449 U.S. at 260-61. The existence of a grievance process did not make the tenure decision "tentative." *Id.* at 261. And "the pendency of a grievance ... does not toll the running of the limitations period[]." *Id.* So the conclusion of the grievance process was not "when the tenure decision was made." *Id.* at 259,261.

Yet Moini insists that the relevant date is September 19,2018, when he received a final decision from the Board of Trustees on his grievance. His arguments are unpersuasive.

For one, he suggests that under the Faculty Code, a decision on tenure does not become "final" until the end of the grievance process. *See* Pl.'s Opp'n at 27; Pl.'s Proposed Sur-Reply at 3-4.[7] This argument, which conflates the tenure review process and the grievance process, fails for two reasons.

First, it contradicts the Faculty Code, which he attached as an exhibit to his Complaint. The Court need not accept a plaintiff's factual allegations "insofar as they contradict exhibits to the complaint." *Owens,* 897 F.3d at 272-73. The Faculty Code cleanly distinguishes between the tenure review process and the grievance process. *See* Compl. Exs. at 28-30, 36. In the former, the Provost's decision is normally "final," with exceptions. *Id.* at 39. One exception is

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[7] Moini has moved for leave to file this sur-reply. Pl.'s Mot. for Leave to File at 1, ECF No. 10. The President opposes this motion, arguing that his reply brief introduced no new arguments. Def.'s Opp'n to Mot. for Leave at 1, ECF No. 12; *see Ben-Kotel* v. *Howard Univ.,* 319 F.3d 532, 536 (D.C. Cir. 2003) (noting that sur-replies are appropriate when a reply brief presents new arguments). The Court agrees with the President here and thus denies the motion. Moini cites no new argument that the President makes in his reply brief, and none is apparent. Moini instead asserts that the reply brief contains factual inaccuracies. Pl.'s Mot. for Leave to File at 1. But in any event, the proposed sur-reply would not affect how the Court resolves the President's motion to dismiss. In this Section, the Court rejects the arguments that Moini makes in his proposed surreply on the timeliness of his Title VII and DCHRA claims. (These arguments are intertwined with the ones he raises in his opposition brief.) And nothing in the proposed sur-reply affects the Court's decision to allow Moini's other claims to proceed. *See infra* Sections III.B & 1II.C.

when, as here, the College's Personnel Committee, the College's Dean, and the Provost all disagree with the Department's recommendation. *Id.* When this happens, the tenure application goes to the Faculty Senate and then the President, who makes "a final decision." *Id.* at 39-40. If the President "approve [s] tenure," then the decision is "transmitted to the Board of Trustees, which has the authority to confer tenure." *Id.* at 40. Thus, since the President did not approve Moini's tenure, the Board was not involved in the tenure review process, and the President's adverse decision was "final." *See* Compl. ¶¶ 37-40; Compl. Exs. at 40.[8]

So under the Faculty Code, the grievance process is simply a way to mount a collateral attack on the President's final decision-it does not make that decision any less final. *See* Compl. Exs. at 28-30,36; *Ricks,* 449 U.S. at 261. Moini focuses on a paragraph in the Code's grievance section that speaks of a "Final Disposition." PI. 's Proposed Sur-Reply at 4. But this paragraph is about the final decision in the grievance process, not the tenure review process. *See* Compl, Exs. at 49. With any grievance process, just as with any tenure review process, there will be a "final" decision. That mere fact, however, does not make the final decision in the grievance process the proper focal point. *See Ricks,* 449 U.S. at 260-6l.

This leads to the second independent reason Moini's argument here falls short: under *Ricks,* it fails as a matter of law. In suggesting that a decision in the tenure review process does not become "final"

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[8] For this reason, Moini is wrong when he suggests that the Board of Trustees always makes the final decision in the tenure review process. *See* Pl.'s Opp'n at 27; Pl.'s Proposed Sur-Reply at 3.

until the end of the grievance process, he asks the Court to focus on the final decision in the grievance process. But *Ricks* was categorical that the final decision in the grievance process is not the proper focal point. A grievance procedure, *"by its nature,* is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 261 (first emphasis added); *see also id.* at 261 n.15 ("Mere requests to reconsider ... cannot extend the limitations periods applicable to the civil rights laws."). Moini points to no material differences between the grievance process here and the one at issue in *Ricks,* nor are any apparent. *See* Pl.'s Opp'n at 27; PI's Proposed Sur-Reply at 3-4. Nor does he claim that the process he went through was *not* a "grievance process"-he uses that precise term. Compl, ¶ 41. Thus, since *Ricks-at* the motion to dismiss stage-rejected the grievance process as the proper focal point, *see* 449 U.S. at 254, 260-61, the Court will do the same here."[9]

Moini also contends that the Court should use September 19 because the EEOC "accepted" that date. PI.'s Opp'n at 27. This argument runs headlong into *Ricks.* If the question was what date

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[9] Relatedly, Moini at times suggests that the Court should use the September 19 date simply because that is when the Board of Trustees provided its decision. *See* Pl.'s Opp'n at 27 ("[T]he Supreme Court ruled the date the Delaware State College Board of Trustees made its final decision to be the final day of employment for Ricks. September 19, 2018 was when Moini received the University's Board of Trustees final decision."). But this gets *Ricks* backwards. Its selection of the June 26 date turned not on the identity of the decisionmaker, but on the nature of the decision. *See* 449 U.S. at 260-62. Here, the Board of Trustees gave Moini a final decision on his grievance, but that decision is the wrong focal point. *See* Compl. ¶¶ 37-41,53; Compl. Exs. at 760; *supra* note 5; *Ricks,* 449 U.S. at 260-61.

the EEOC had "accepted," the Court would not have engaged in any analysis of "when the tenure decision was made and Ricks was notified." 449 U.S. at 259. It would have just asked what date the EEOC had "accepted." But it did not. *see id.* at 259-62. So the date that Moini wrote on his EEOC form-and any date the EEOC "accepted"-does not control.

Finally, Moini alleges that he did not obtain "most" evidence of the University's discrimination against him until the grievance process. Compl. ¶¶ 41,55; *see also* PI.'s Proposed Sur-Reply at 4 ("[A]s discussed in the Complaint, the EEOC [charge] and this Complaint were filed when abundant evidences of racial discrimination by the University against the Plaintiff ... were obtained during the grievance process[.]"). Moini does not explain why this would mean that the limitations period began on September 19. Perhaps he is intimating that he was not fully aware of the alleged discrimination before the grievance process concluded. But as the President points out, Moini suggests elsewhere in his Complaint that he suspected bias from the outset. Def's Mem. at 28-29; *see* Compl. ¶ 56. And documents that he filed *during* the grievance process-as early as November 2017-charge that the University was "biased" against him. Compl, Exs. at 400,416.

In any event, other judges in this District have concluded that "[n]otice or knowledge of discriminatory motivation is not a prerequisite for a cause of action to accrue." *Fortune* v. *Holder,* 767 F. Supp. 2d 116, 122 (D.D.C. 2011) (quoting *Hulsey v. Kmart, Inc.,* 43 F.3d 555, 558 (10th Cir. 1994». Rather, "it is knowledge of the adverse employment decision itself that triggers the running of the statute of limitations." *Id.* Courts of appeals agree. *See Hamilton* v. *1st Source Bank,* 928 F.2d 86, 88-89

(4th Cir. 1990) ("To the extent that notice enters the analysis, it is notice of the employer's actions, *not* the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period."); *Merrill* v. S. *Methodist Univ.*, 806 F.2d 600, 604-05 (5th Cir. 1986) (same).

Indeed, *Merrill* reached this conclusion by relying on *Ricks*. *See* 806 F.2d at 605. The plaintiff in *Merrill* proposed that the court "focus on the date the victim first perceives that a discriminatory motive caused the act, rather than the actual date of the act itself." *Id.* But this proposal was "inconsistent" with *Ricks,* the "leading case on this subject." *Id.* It clashed with *Ricks's* teaching that "the Title VII limitations period is partially designed to 'protect employers from the burden of defending claims arising from employment decisions that are long past. '" *Id.* (quoting *Ricks,* 449 U.S. at 256-57); *accord Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir. 1990) ("The discovery rule is implicit in the holding of *Ricks* that the statute of limitations began to run' at the time the tenure decision was made *and communicated* to Ricks[.]'" (quoting *Ricks,* 449 U.S. at 258)). Thus, because June 22, 2017, was when the University notified Moini that it had denied him tenure and that his appointment for the upcoming academic year would be "terminal," that is when "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

From here, the analysis is straightforward. Moini filed his charge with the EEOC no earlier than April 14, 2019. Compl. Exs. at 763.[10] That is well

[10] April 14 was when Moini sent an "initial inquiry" to the EEOC. Compl. Exs. at 763. As the President points out, he filed his formal charge on July 12. Def.'s Mem. at 27 n.11, 50. But

more than 300 days after June 22, 2017. So Moini's Title VII claim is time-barred, and the Court will dismiss it. *See* 42 U.S.C. § 2000e-5(e)(1); *Ricks,* 449 U.S. at 254-55,256 & n.7, 260 n.13.[11]

As for Moini's DCHRA claim, it is also time-barred. An individual must file a DCHRA claim "within one year of the unlawful discriminatory act, or the discovery thereof." D.C. Code § 2-1403.16(a); *see Estenos* v. *PAHO/WHO Fed. Credit Union,* 952 A.2d 878, 885 (D.c. 2008). But "timely filing a claim with the [EEOC], which in turn cross-files with DCHRA, tolls the time for filing a private cause of action under D.C. law." *Estenos,* 952 A.2d at 882, 886.

The one-year limitations period for the DCHRA began to run on June 22,2017. The D.C. Court of Appeals generally relies on decisions of

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even the earlier date was well more than 300 days after June 22, 2017.

[11] As the President notes, arguably Moini had only 180 days-not 300 days-to file his EEOC charge. Def.'s Mem. at 29 n.15. Moini does not allege that he "initially instituted proceedings with a State or local agency" before filing with the EEOC. 42 U.S.C. § 2000e-5(e)(1). At most, when he filed his EEOC charge, it was "automatically cross-filed with the D.C. Office of Human Rights pursuant to a work-sharing agreement." *Epps v. Potomac Elec. Power Co.,* 389 F. Supp. 3d 53,59 (D.D.C. 2019). Other judges in this District have concluded that, in this circumstance, the 180-day limitations period applies. *See, e.g., id.* at 59-60; *Ashraf-Hassan v. Embassy of France,* 878 F. Supp. 2d 164, 170-71 (D.D.C. 2012); *but see Chambers* v. *District of Columbia,* 389 F. Supp. 3d 77,86-87 (D.D.C. 2019), *appeal filed,* No. 19-7098 (D.C. Cir.) (relying on *Carter v. George Wash. Univ.,* 387 F.3d 872, 879 (D.C. Cir. 2004)). If the 180-day period applies, Moini's Title VII claim is untimely *even if* the clock began on September 19, 2018, rather than June 22, 2017. The date of Moini' s initial EEOC inquiry-April 14, 2019-was more than 180 days after September 19, 2018.

federal courts in Title VII cases when applying the DCHRA. *See Daka, Inc.* v. *Breiner,* 711 A.2d 86, 94 (D.C. 1998). Indeed, that court has expressly followed *Ricks* many times. It has done so to conclude that the one-year limitations period for wrongful termination claims begins to run when the employee is "notified *unequivocally* of his termination." *Barrett* v. *Covington & Burling LLP,* 979 A.2d 1239, 1252 (D.C. 2009) (quoting *Stephenson* v. *Am. Dental Ass 'n,* 789 A.2d 1248, 1252 (D.C. 2002) (also following *Ricks)).* And it has relied on *Ricks* to hold that "review of the final termination through grievance proceedings did not make the termination less final, nor did plaintiffs availing herself of grievance procedures toll the time for statutory action." *Jones* v. *Howard Univ., 574* A.2d 1343, 1346-47 & n.5 (D.C. 1990) (cleaned up).

Barrett, Stephenson, and *Jones* did not even involve a denial-of-tenure allegation, yet the D.C. Court of Appeals followed *Ricks* in those cases. So it would surely do so in a case that *does* involve that allegation. Thus, the limitations period for Moini's DCHRA claim began to run when Title VII's limitations period began to run under *Ricks.* That date is June 22, 2017.

Moini brought his DCHRA claim on October 16,2019. That was far too late. It makes no difference that Moini filed an EEOC charge. He did not do so until April 2019 at the earliest, *after* the one-year limitations period expired in June 2018. And in any event, the rule is that *"timely* filing a claim with the [EEOC]" tolls the limitations period for a DCHRA claim. *Estenos,* 952 A.2d at 882 (emphasis added). As explained in the Title VII discussion, Moini did not "timely" file his EEOC charge. For these reasons, Moini's DCHRA claim is untimely and the Court will

dismiss it. *See* D.C. Code § 2-1403.16(a); *Estenos,* 952 A.2d at 885-86.

Since the Court is dismissing Moini's Title VII claim and his DCHRA claim, it will dismiss Count I of the Complaint. *See* Compl. ¶ 84.

C.

The University President next urges the Court to dismiss Moini's claim under 42 U.S.c. § 1981 (Count III). But this time, Supreme Court precedent cuts in Moini's favor.

Under § 1981, "[a]1I persons ... shall have the same right in every State ... to make and enforce contracts ... as is enjoyed by white citizens." To state a claim under this statute, "the plaintiff must allege that (1) [he] is a member of a racial minority; (2) the defendant intended to discriminate against [him] on the basis of race; and (3) the discrimination concerned an activity enumerated in § 1981." *Wilson* v. *DNC Servs. Corp.,* 417 F. Supp. 3d 86, 91 (D.D.C. 2019). The President contends that Moini "failed to sufficiently plead the first two elements." Def.' s Mem. at 33. The Court disagrees, given the low pleading bar and the even "less stringent standards" that apply to *pro se* complaints. *Erickson,* 551 U.S. at 94.

On the first element, the President argues that Moini has alleged discrimination because of *national origin,* rather than discrimination because of race. Def.'s Mem. 33-34. The President believes that Moini's self-description as "Middle Eastern" and "Iranian" is about national origin, not race. *Id.* at 33. And because § 1981 protects against discrimination because of race, but *not* national origin, the President concludes that Moini has no claim under

this statute. *Id.* (citing *Nono* v. *George Wash. Univ.*, 245 F. Supp. 3d 141, 147 (D.D.C. 2017)).

The reality is not so clear-cut. Once again, we have a Supreme Court decision on point: *Saint Francis College v. Al-Khazraji,* 481 U.S. 604 (1987). The plaintiff in that case--an associate professor-was "a citizen of the United States born in Iraq." *Id.* at 606. The College denied him tenure, so he filed a *pro se* complaint raising claims under Title VII and § 1981. *Id.* The district court ruled that § 1981 "does not reach claims of discrimination based on Arabian ancestry." *Id.* The Third Circuit reversed. It held that the plaintiff "had alleged discrimination based on race and that although under current racial classifications Arabs are Caucasians, [he] could maintain his § 1981 claim." *ld.* at 607. Section] 981, in its view, reached "discrimination directed against an individual because he 01' she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens." Id.*

This time, the Supreme Court agreed with the Third Circuit. *ld.* The Court had "little trouble in concluding" that § 1981 protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 613. "Such discrimination," the Court reasoned, is "racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory." *ld.* So the bottom line was this: if a plaintiff "can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin ... he will have made out a case under § 1981." *Id.*

Given *Saint Francis College,* Moini has pled "racial discrimination" under § 1981 if he has alleged that the University discriminated against him "solely because of [his] ancestry or ethnic characteristics." *Id.* The President insists that Moini has not done so. Def.'s Reply at 7- 8, ECF No.9. He points out that the Complaint, at several points, refers simply to discrimination because of "national origin" or "country of origin." *Id.* at 8; *see, e.g.,* Compl. ¶ 4. The President also observes that Moini checked the box for "national origin"-not "race"-on his EEOC charge. Def.'s Mem. at 33,50.

As support, the President relies mainly on *Ndondji* v. *InterPark Inc.,* 768 F. Supp. 2d 264 (D.D.C. 2011), a decision that grappled with how to apply *Saint Francis College.* The plaintiff-who had counsel-raised § 1981 claims, but Judge Bates dismissed them. *Id.* at 269, 275. He refused to endorse the plaintiffs "attempt to blur race and national origin." *Id.* at 273.

The plaintiff alleged that his former employer treated "Americans" differently from "foreign nationals." *Id.* For Judge Bates, a distinction between "Americans" and "foreign nationals" was a distinction based on country of origin, not "ancestry or ethnic characteristics." *See id.* The plaintiff identified as an "Angolan," but he never explained "why identifying oneself as 'Angolan' should be considered a 'very distinct' ancestral or ethnic characteristic rather than a person's place of birth or origin." *Id.* at 274. In short, the "clear thrust" of the complaint was "national origin discrimination." *Id.* And the plaintiffs EEOC charge "reinforce[d]" this reading, since he had checked off the "national origin" box instead of the "race" box. *Id.* Judge Bates's opinion is thorough and well-reasoned.

Moini's § 1981 claim can proceed only because there are a few differences between his case and *Ndondji.* For one, he describes himself as "Middle Eastern"-not just "Iranian"-which suggests a focus on "ancestry or ethnic characteristics," rather than just country of origin. *Cj Saint Francis College,* 481 U.S. at 613 (holding that an Iraqi native could make out a § 1981 claim if he could prove discrimination "based on the fact that he was born an *Arab"* (emphasis added)).

Moini also describes other professors-who the University allegedly treated more favorably--as "Caucasian," "white," and "of European descent." Compl. ¶¶ 1, 7, 57, 60, 88. Use of these terms suggests racially tinged discrimination within the meaning of § 1981. *Cf. Saint Francis College,* 481 U.S. at 610 ("Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law."). Contrast his allegations with those of Ndondji, who "never identifie[d] ... the races of other similarly situated employees who were allegedly treated more favorably than he was." 768 F. Supp. 2d at 275.

And unlike Ndondji, Moini is proceeding *pro se.* The Supreme Court drew a subtle distinction in *Saint Francis College.* A plaintiff must prove discrimination based on his "ancestry or ethnic characteristics," rather than discrimination based on "the place or nation of his origin." 481 U.S. at 613. The two concepts are connected. *Cj id.* ("It is clear ... that the civil rights sections of the 1870 Act provided protection for immigrant groups such as the Chinese."). The Court is mindful of the "less stringent standards" that apply to *pro se* complaints. *Erickson,* 551 U.S. at 94. Given these lower standards-and given that Moini does make *some*

allegations suggesting discrimination because of "ancestry or ethnic characteristics"-he has done just enough to plead a § 1981 claim.[12]

The Court does not find it dispositive that Moini checked the "national origin" box on his EEOC form instead of the "race" box. The President cites no authority suggesting that a *pro se* plaintiff forfeits a § 1981 claim by doing so. *See* Def.'s Mem. at 33-34; Def.'s Reply at 7-8. Even in *Ndondji-not* a *pro se* case-the failure to check the "race" box on the EEOC form was just one factor in the analysis. *See* 768 F. Supp. 2d at 273.

The President's next argument for dismissal focuses on the second element of a § 1981 claim-the causation element. A plaintiff must plausibly allege that his "ancestry or ethnic characteristics" were the "but for" cause of the defendant's actions. *See Comcast Corp.* v. *Nat 'l Ass 'n of African Am.-Owned Media,* 140 S. Ct. 1009, 1019 (2020). As the President sees it, Moini has not plausibly alleged but-for causation. Def.'s Mem. at 34-39; Def.'s Reply at 9-11; Def.'s Notice of Sup pl. Authority at 1-2, ECF No. 14.

The Court disagrees. The federal rules set forth "liberal pleading standards." *Erickson,* 551 U.S. at 94. And *pro se* complaints are subject to even less

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[12] The President footnotes two decisions other than *Ndondji,* but neither warrants a different conclusion. Def.'s Reply at 8 n.2. In one case, the plaintiff had counsel, and the court rejected his § 1981 claim on summary judgment, rather than at the pleading stage. *Kalantar* v. *Lufthansa German Airlines,* 402 F. Supp. 2d 130,133,137-38 (D.D.C. 2005). In the other case, the court dismissed a *pro se* plaintiff s § 1981 claim because it was "solely based on the fact that he is from Afghanistan." *Amiri* v. *Hilton Wash. Hotel,* 360 F. Supp. 2d 38, 42 (D.D.C. 2003). For the reasons stated, Moini has done just enough to avoid the same fate.

stringent standards. *Id.* Given the low bar, Moini has done enough to plead but-for causation.

The essence of Moini' s Complaint is that the University denied him tenure on the pretext of his poor student evaluations, when the real reason was his ancestry or ethnic characteristics. *See* Compl. ¶¶ 1, 5, 57, 60. He makes some allegations that, liberally construed, support this claim. For example, he asserts that" 100%" of the tenured professors in the Department of Forensic Sciences are, unlike him, "Caucasian" and "of European descent." *Id.* ¶¶ 7,57. He observes that denying him tenure maintained this status quo. *Id.* ¶ 57. He also offers Professor Rowe as a comparator. Rowe received a promotion to Department Chair, even though he had "received similarly poor student evaluations" from the same graduate seminar. *Id.* More generally, Moini alleges "a toxic atmosphere of racism and bias" at the University. *Id.* ¶ 1. And "[w]hile the University President and Provost were well aware" of this racism, "they ignored its effects on teaching evaluations of minority faculty." *Id.* ¶ 59.

Moini's allegations also plausibly suggest that the stated reason for denial of tenure-his poor student evaluations-was pretextual. His tenure application went through six levels of review, and his grievance went through four levels. Most of his reviewers recommended against tenure, but not all. The Departmental Committee "unanimously" recommended tenure. *Id.* ~ 35. The Appeals Panel was also unanimous in voting to uphold Moini's grievance. *Id.* ¶ 46; Compl. Exs. at 53. This Panel found it troubling that others had relied so heavily on the poor student evaluations. Compl. Exs. at 54. So too did the dissenting member of the initial Hearing Panel. *ld.* at 7-9. That dissenter cited an

internal memorandum for the College of Arts and Sciences stating that "[s]tudent evaluations ... are an imperfect tool for measuring teaching evidence and quality." *Id.* at 7. That could be relevant. *See Brady* v. *Office of Sergeant at Arms,* 520 F.3d 490, 495 n.3 (D.C. Cir. 2008) (noting that an employee can "try to cast doubt on an employer's asserted reason" by pointing to "the employer's failure to follow established procedures or criteria").

To be clear, the Court is not saying that Moini will ultimately be able to prove his case. Far from it. He has his work cut out for him. For example, it is not clear that Rowe is an appropriate comparator. Moini invokes the University's decision to promote Rowe to Department Chair. Compl. ¶ 57. But the standards governing that decision might differ from the standards governing tenure. And differences would be relevant. *See Burley* v. *Nat 'l Passenger Rail Corp.,* 801 F.3d 290, 301 (D.C. Cir. 2015) ("A plaintiff must ... demonstrate that all of the relevant aspects of his employment situation were nearly identical to those of the other employee." (cleaned up)).

More, there is the issue of pretext. Even if the University had no *good* reason to deny Moini tenure, that need not mean its reason was *pretextual. See Fischbach* v. *D. C. Dep't of Corr.,* 86 F .3d 1180, 1183 (D.C. Cir. 1996) ("[T]he issue is not the correctness or desirability of the reasons offered ... but whether the employer honestly believes in the reasons it offers." (cleaned up)). The pleading stage is an especially low bar for *pro se* plaintiffs, and today the Court holds

only that Moini's § 1981 claim clears that low bar. So the Court will not dismiss Count III.[13]

The Court will also not dismiss any of Moini's contract claims at this stage (Counts II and IV). The issues surrounding these claims are fact-bound. Questions of what obligations the University had and whether it breached any of those obligations depend heavily on how to interpret the Faculty Code. The Court thinks it best to wade into these issues-if ever-at summary judgment.[14] For now, the Court holds only that Moini has plausibly alleged one or more contract claims, particularly given his *pro se* status. *Erickson,* 551 U.S. at 94.

To state a claim for breach of contract under D.C. law, a plaintiff must allege: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez,* 984 A.2d 181, 187 (D.C. 2009). The statute

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[13] After briefing was complete, Moini moved to add an exhibit to his opposition brief. Mot. For Leave to Amend, ECF No. 13. It is a faculty petition calling for the University President to resign because of "racist remarks." *Id.* at 1. The purpose of this motion is to help corroborate Moini's claim of race discrimination. *See id.* at 3. The Court will deny this motion as untimely, since it came nearly two months after he filed his opposition brief. In any event, the proposed exhibit would not affect the Court's conclusions here. Moini has done enough to plead a § 1981 claim based on his Complaint and the exhibits he attached to it. And the proposed exhibit has nothing to do with the timeliness of his Title VII and DCHRA claims. Moini is free to include this exhibit at the summary judgment stage. *See* Fed. R. Civ. P. 56(c)(l)(A).

[14] If the Court ends up denying the § 1981 claim at summary judgment, it may decide not to exercise supplemental jurisdiction over any remaining contract claims. *See* 28 U.S.C. § 1367(c)(3).

of limitations for these claims is three years. D.C. Code § 12- 301(7).

The President reads Counts II and IV of Moini's Complaint as raising three claims for breach of contract. Def.' s Mem. at 40-44. His arguments for dismissing them now are unpersuasive.

First, Moini alleges a breach based on the University's failure to provide him with enough notice of the concerns about his teaching. Compl, ¶¶ 86, 90. The President urges that Moini's exhibits "refute" his own allegations on this point. Def.'s Mem. at 40. For example, the President points to faculty evaluations that Moini received before he applied for tenure. *Id.* But *some* notice does not necessarily mean *enough* notice. This issue requires closer attention to what communications the University had with Moini about his teaching and what communications-if any--the Faculty Code requires.

Second-and relatedly-Moini alleges that he did not receive a "mid-tenure review." Compl. ¶¶ 16, 79. The President says this claim is time-barred under D.C.'s three-year statute of limitations because it would have accrued no later than September 20 15- "midway between his start date of January 1,2014 and the end of his initial appointment on June 30, 2017." Def.'s Mem. at 40-41. But the President's unstated assumption here is that a "mid-tenure review" must occur by the exact midway point. For now, he has not provided enough basis for this assumption.

Third, Moini alleges that denying him tenure was an "arbitrary and capricious" action, which the Faculty Code forbids. Compl. ¶ 2. The President stresses that courts "generally give deference" to the decisions that universities make, including tenure

decisions. Def.' s Mem. at 42 (citing *Brown v. George Wash. Univ.,* 802 A.2d 382, 385 (D.C. 2002)). Even so, Moini has made a plausible allegation of an "arbitrary and capricious" decision. For example, recall that the Appeals Panel and the dissenting member of the Hearing Panel found it troubling that others had relied heavily on the student evaluations. *See supra* Section III. B. At summary judgment, the Court will be in a better position to consider how much deference to give the University.

The President also seeks dismissal of any other "sundry" contract claims that Moini alludes to in his Complaint. Def.'s Mem. at 44-47. These include allegations that the University failed to provide "metrics for measuring teaching excellence" and that it did not follow its own procedures during the grievance process. Compl. ¶ 3. The Court will not parse these allegations now. They are intertwined with Moini's other contract claims. More, they are fact-bound and touch on fine details of the Faculty Code. *See* Def.'s Mem. at 45-46.

The President urges the Court to dismiss some of these contract claims because, at the very least, Moini suffered no damages. *Id.* He contends that under D.C. law, proof of actual damages is an element of a contract claim. *Id.* at 45 & n.30. This may not be correct. *See Wright* v. *Howard Univ.,* 60 A.3d 749, 753 (D.C. 2013) ("Even where monetary damages cannot be proved, a plaintiff who can establish a breach of contract is entitled to an award of nominal damages."). At best, there is a conflict within the caselaw on this question. *Compare id., with Osbourne* v. *Capital City Mortg. Corp.,* 727 A.2d 322, 324-25 (D.C. 1999) ("[A]ppellants' *prima facie* case for breach of contract ... required some proof of

damages."). The Court sees no reason to weigh in on this potential conflict now.

IV.

For these reasons, it is hereby
ORDERED that Defendant's [6] Motion to Dismiss is GRANTED IN PART and DENIED IN PART; it is further
ORDERED that Count I of Plaintiffs **[1]** Complaint is DISMISSED; and it is further
ORDERED that Defendant shall file a responsive pleading to Plaintiffs [1] Complaint on or before May 8, 2020. *See* Fed. R. Civ. P. 12(a)(4)(A).
SO ORDERED.[15]
Dated: April 24, 2020
TREVOR N. McFADDEN, U.S.D.J.

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[15] The Court has considered Moini' s request for a hearing on the President's motion to dismiss, *see* Pl.'s Opp'n at 3, but finds oral argument unnecessary here. *See* LCvR 78.1.

Opinion and Order of the United States District Court for the District of Columbia Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Cross Motion (May 13, 2022)

United States District Court, District of Columbia

MEHDI MOINI,

Plaintiff,

v.

MARK S. WRIGHTON, in his official capacity as President, George Washington University,

Defendant.

1:19-cv-03126 (TNM)
05-13-2022

MEMORANDUM OPINION

George Washington University denied tenure to Dr. Mehdi Moini. Proceeding *pro se*, Moini sued the University's President-a position held by Dr. Thomas LeBlanc at the time and now by Dr. Mark S. Wrighton-alleging that the denial violated multiple laws and his employment contract. After the Court partially granted the President's motion to dismiss, the parties proceeded to discovery. That phase is

complete, and both parties now move for summary judgment.

The Court finds that the University propounded a legitimate reason for denying tenure: That Moini had not met the requisite standard for teaching. Moini tries to show that this explanation was pretext for race discrimination. None of his arguments succeed. So too for his contractual claims, which are either time-barred or do not show any violation of a contract by the University.

The Court therefore will grant the President's motion and deny Moini's 1 cross-motion.[16]

I. BACKGROUND

A. The Tenure Application and Review

The University is a private institution in Washington, D.C. Moini, who identifies himself as a "Middle Eastern (Iranian) man." Compl. ¶ 5, ECF No. 1, began his career there in 2014 as an untenured Associate Professor in the Department of Forensic Sciences (the Department), *see* Def.'s Statement of Mat'l Undisputed Facts (Def.'s SMUF) ¶¶ 8, 9, 11, ECF No. 48. Although the University did not hire Moini to a tenured position, it said it would reach a tenure decision in three-and-a-half years-by mid-2017. *See id.* ¶¶ 9, 11. That timeline was quicker

[16] Many of the docket entries are sealed, with all exhibits combined into one large ECF document, complicating citations. For documents like declarations that have paragraph numbers, the Court cites the paragraph number in-line and provides in footnotes the CM/ECF page numbers where the entire document can be found. For instance, Defendant's SMUF is available at ECF No. 48, pages 58-124. For documents without paragraph numbers, the Court provides in-line citations. All page numbers refer to the pagination generated by the CM/ECF system.

than usual: the University typically makes tenure decisions after seven years. *See id.* ¶ 9.

When Moini accepted the position, he agreed to all conditions "stated in the Faculty Code and Faculty Handbook." Def.'s Mot. for Summ. J. (Def.'s MSJ), Ex. 22, ECF No. 48 at 950. The Code contains the criteria for tenure. As of 2015, it reserved tenure for faculty "who demonstrate excellence in scholarship, teaching, and engagement in service and who show promise of continued excellence." Def.'s MSJ, Ex. 6 (Faculty Code) § IV(C)(1), ECF No. 48.[17] This case centers on the "excellence in teaching" criterion.

Moini began teaching classes in fall 2014, including a mandatory graduate seminar called FORS 6292. *See* Def.'s SMUF ¶¶ 73, 74. Moini originally did not teach the class alone. From Fall 2014 to Spring 2016 he co-taught with Dr. Walter Rowe, *see id.* ¶ 77, a Caucasian tenured professor.

Students would evaluate each class at the end of the semester and rate faculty on a scale of one to five, with five being the best. *Id.* ¶ 80. During Moini's first year, students evaluated him and Rowe together. *Id.* ¶ 77. The average scores in those evaluations fell short of the Department's overall average. *See id.* ¶¶ 85, 89. Moini also co-taught two other classes and received similarly below-average evaluations from students. *See id.* ¶¶ 87, 91.

Those scores did not escape the notice of University officials. The Department Chair, Victor Weedn, told Moini in 2014 that his teaching needed to improve because Moini's scores "[were] not as good as the others." Def.'s MSJ, Ex. 10 (Weedn Dep.), ECF No. 48 at 681. Weedn also referred Moini to the

[17] Available at pages 474–506.

University's Teaching Center. *See* Def.'s MSJ, Ex. 13 (Moini Dep.), ECF No. 48 at 784. And in 2015, Weedn told Moini and Rowe that their seminar had prompted critical comments from students. *See id.* at 803.

Starting in Fall 2015, students could evaluate teachers individually. *See* Def.'s SMUF ¶ 93. Between that time and when he submitted his application for tenure, Moini taught six classes. He received below-average scores in five of them. *See id.* ¶¶ 93, 95, 97, 99, 101, 103. That trend continued after Fall 2016, when Moini began teaching the graduate seminar by himself.

The University had promoted Rowe to Department Chair earlier that year. *See id.* ¶ 22. With that position, Rowe wrote some of Moini's annual report for the 2015–16 school year. *See* Def.'s MSJ, Ex. 18, ECF No. 48 at 902–918. Rowe praised Moini as "a valuable asset to the Department" but admitted that student evaluations of Moini were "a mixed bag." *Id.* at 916. Moini particularly "need[ed] to improve the graduate seminar course." *Id.* Moini himself admitted in that same report that his evaluations "show[ed] mixed results." *Id.* at 907.

In September 2016, Moini applied for tenure and promotion. *See* Def.'s SMUF ¶ 126. That submission began a multi-level process of review. First, the Department's Personnel Committee—chaired by Rowe—evaluated Moini's materials. The Committee praised his "very strong research program" and "strongly positive" evaluations from external reviewers. *See* Def.'s MSJ, Ex. 3B, ECF No. 48 at 153. But the Committee also noted that Moini's student evaluations were "notably below departmental averages." *Id.* "Because of this," the Committee could not vote for tenure but requested

that the Dean extend Moini's tenure clock. *Id.* The Dean denied that request. *See* Def.'s SMUF ¶ 133. So the Committee reconvened and "unanimously" voted to recommend Moini for tenure. Def.'s MSJ, Ex. 3C, ECF No. 48 at 155.

According to Rowe, who supported Moini's elevation, the Committee felt he was "too valuable an assert [sic]" to lose. *Id.* Rowe then wrote a letter in which he "strongly endorse[d]" the recommendation of tenure. Def.'s MSJ, Ex. 3D, ECF No. 48 at 160. Rowe acknowledged that Moini's evaluations "ha[d] been below departmental averages," but the Department doubted that those evaluations "provide[d] a complete picture of [Moini's] interactions with [ ] students." *Id.* at 159.

Moini's tenure application then followed a lengthy and ultimately fruitless path:

- The Personnel Committee of the Columbian College of Arts and Sciences (CCAS or the College)—which housed the Department—reviewed Moini's application. *See* Def.'s SMUF ¶ 148. Based on the low numerical scores and negative comments from students, the committee had "a strong negative impression of [ ] Moini's teaching," which "f[ell] well below" what the committee "would expect from [ ] tenured colleagues." Def.'s MSJ, Ex. 4G, ECF No. 48 at 368. So the committee recommended against tenure.

- The College's Dean agreed with the CCAS Committee that Moini's teaching "ha[d] not manifested excellence." *See* Def.'s MSJ, Ex. 4H, ECF No. 48 at 373. He recommended against tenure. *See id.* at 373.

- The University's Provost likewise recommended against tenure. *See* Pl.'s MSJ, Ex. 50, ECF No. 53-6 at 1140–41.
- Moini's application went to review by the Faculty Senate Executive Committee (FSEC). *See id.* ¶ 163. The FSEC first found that Moini's application "[did] not provide substantial evidence of excellence in teaching" but then recommended to extend his tenure clock rather than deny tenure. Def.'s MSJ, Ex. 4I, ECF No. 48 at 388.
- The University President disagreed.[18] He denied tenure outright, determining that Moini had "failed to meet the standard of excellence in teaching." Def.'s MSJ, Ex. 4J, ECF No. 48 at 390.

The President's decision was final, and the University informed Moini of it in June 2017. *See* Def.'s SMUF ¶ 171.

B. The Grievance Process

But that was not the end of the matter. In August 2017, Moini filed a grievance under the Faculty Code. *See* Def.'s SMUF ¶ 172. Under that process, a Hearing Committee determines whether a grievant "has established by clear and convincing evidence" a violation of the Code. *See* Procs. for Impl. of Faculty Code § (E)(4)(c)(7), ECF No. 48 at 503. Like the tenure application, the grievance process includes multiple levels of review.

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[18] The President then was Dr. Steven Knapp, not the named Defendant here. *See* Def.'s SMUF ¶ 168.

After hearing arguments from Moini and the University, a majority of the Hearing Committee affirmed the denial of tenure. The majority agreed on the excellence of Moini's scholarship and research but determined that the evaluations from the graduate seminar sustained the earlier conclusion that Moini's teaching fell "short of excellent." Def.'s MSJ, Ex. 30, ECF No. 48 at 1002. One panel member dissented. He concluded that the seminar was, by its structure and content restrictions, "unteachable" regardless of professor. *Id.* at 1004. He also decried the reliance on student evaluations, which he said were not "a sufficient basis for assessing teaching." *Id.*

From there, Moini's grievance followed another multi-step but unsuccessful path:

- Moini first appealed to an Appeals Panel consisting of eight professors from various departments. The Panel unanimously overturned the Hearing Committee's decision, concluding that the Committee and the tenure reviewers had improperly relied "solely on student evaluations of" the graduate seminar, "disregard[ing] every other metric on which teaching should be evaluated[.]" Def.'s MSJ, Ex. 31, ECF No. 48 at 1009.
- The Provost then reviewed the Appeals Panel decision. Contrary to that Panel, he concluded that the various reviewers had considered the entire record, not solely the graduate seminar evaluations. *See* Def.'s MSJ, Ex. 4O, ECF No. 48 at 446. He also noted the Panel's admission that Moini's evaluations were merely "acceptable." *See id.* at 449–50. For these and other reasons, the Provost found compelling

reasons not to affirm the Appeals Panel's decision. *See id.* at 454.

- As a final reviewer, a committee of the University Board of Trustees agreed with the Provost. *See* Def.'s SMUF ¶ 236.

After denial of his grievance, Moini left the University sometime in 2018. *See* Decl. of Daniele Podini, ¶ 13, Def.'s MSJ, Ex. 2, ECF No. 48 at 138–39.

C. This Action

In October 2019, Moini filed this *pro se* Complaint against the President. *See* Compl., ECF No. 1. He alleged that the denial of tenure constituted discrimination in violation of Title VII, a D.C. human rights statute, and 42 U.S.C. 1981. *See id.* He also alleged that the University had violated its contractual obligations during Moini's tenure and grievance processes. *See id.*

The President moved to dismiss the Complaint, and the Court partially granted that motion. *See Moini v. LeBlanc*, 456 F. Supp. 3d 34 (D.D.C. 2020). The Court held that Moini's Title VII and D.C. law claims were time-barred. *See id.* at 45, 46. But the Court denied the motion as to Moini's contractual claims and his claims under § 1981. *See id.* at 50, 51.

After discovery, both parties cross-moved for summary judgment. *See* Def.'s MSJ, ECF No. 48 at 6–57; Pl.'s MSJ, ECF No. 53-1. Those motions are now ripe.[19]

II. LEGAL STANDARDS

[19] The Court has subject matter jurisdiction under 28 U.S.C. § 1331 over Moini's federal claims and supplemental jurisdiction under 28 U.S.C. § 1367 over his contractual claims.

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evidence conflicts, courts must "view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor." *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 850 (D.C. Cir. 2006).

The movant bears the initial burden of identifying those portions of the record that show the lack of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once completed, the other party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (cleaned up). Unsupported allegations or mere denials in the pleadings are not enough. *See* Fed. R. Civ. P. 56(c). Similarly, because the nonmovant must supply evidence that, if true, would allow a reasonable jury to find in his favor, a "mere . . . scintilla of evidence in support of" the nonmovant's position cannot defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252.

Moini proceeds *pro se*, so the Court generally subjects his pleadings to "less stringent standards than formal pleadings drafted by lawyers." *Gray v. Poole*, 275 F.3d 1113, 1115 (D.C. Cir. 2002) (cleaned up). "Any leeway does not extend," however, "to the *evidence* required at summary judgment[.]" *Penkoski v. Bowser*, 548 F. Supp. 3d 12, 20 (D.D.C. 2021)

(emphasis in original). Courts hold *pro se* plaintiffs to the same evidentiary burdens as represented plaintiffs. *See Prunte v. Univ'l Music Grp., Inc.*, 699 F. Supp. 2d 15, 21–22 (D.D.C. 2010), *aff'd*, 425 F. App'x 1 (D.C. Cir. 2011).

III. RACIAL DISCRIMINATION UNDER SECTION 1981

The Court begins with Moini's discrimination claims under § 1981. That statute "protects the equal right of 'all persons within the jurisdiction of the United States' to 'make and enforce contracts,'" including contracts for employment, "without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474–75 (2006) (quoting 42 U.S.C. § 1981(a)). Section 1981 "can be violated only by purposeful discrimination." *Gen. Bldg Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982).

Moini alleges that the University denied him tenure on account of his race. Moini can show unlawful discrimination with either direct or indirect evidence. An employee has direct evidence of unlawful discrimination if the employer "overtly refers to the employee's protected trait when making an unfavorable employment decision." *Deppner v. Spectrum Health Care Res., Inc.*, 325 F. Supp. 3d 176, 187 (D.D.C. 2018) (cleaned up). For example, "a statement that itself shows racial [ ] bias in the decision" qualifies as direct evidence. *Vatel v. All. of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011). Because direct evidence is "hard to come by," *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) (cleaned up), its presence "generally entitle[s] a plaintiff to a jury trial," *Vatel*, 627 F.3d at 1247.

When a plaintiff must instead rely on indirect evidence of discrimination, the familiar *McDonnell Douglas* burden-shifting framework governs. *See Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 467 (D.C. Cir. 2017). That framework has three parts.

First, a plaintiff must establish a prima facie case of racial discrimination. To prove such a case under § 1981, the plaintiff must show that (1) he is a member of a racial minority; (2) his employer intended to discriminate against him on the basis of race; and (3) the discrimination concerned an activity enumerated in § 1981. *See Wilson v. DNC Servs. Corp.*, 417 F. Supp. 3d 86, 91 (D.D.C. 2019), *aff'd*, 831 F. App'x 513, 516 (D.C. Cir. 2020).

Next, the burden shifts to the employer to produce a "legitimate, non-discriminatory reason" for its actions. *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (Kavanaugh, J.). If the employer produces that evidence, the burden swings back. To survive summary judgment, the employee must show that the employer's explanation was not its true reason and instead was pretextual. *See Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1114 (D.C. Cir. 2016).

That said, once the employer asserts a nondiscriminatory explanation supported by evidence, "the question whether the employee actually made out a prima facie case is no longer relevant." *Brady*, 520 F.3d at 493 (cleaned up). So a court proceeds to the ultimate question: whether the employee has produced enough evidence for a reasonable jury to find that the employer's explanation was not the actual basis for its actions and that discrimination was the real reason. *See id.* "Of course, consideration of this question requires

[the court] to evaluate all of the evidence before [it], including the same evidence that a plaintiff would use to establish h[is] prima facie case." *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *accord Harris v. Trustees of Uni'v of Dist. of Colum.*, --- F. Supp. 3d ---, 2021 WL 4399552, at *5 (D.D.C. Sept. 25, 2021).

A. Direct Evidence

The Court begins with direct evidence. Moini largely does not point to direct evidence—most of his arguments focus on pretext under the *McDonnell Douglas* framework. *See, e.g.*, Pl.'s MSJ at 23, 28 (discussing the "pretextual" nature of multiple parts of the review process). But he does cite comments that Rowe allegedly made in class. *See* Pl.'s Reply, ECF No. 63 at 8. According to Moini, Rowe often denigrated immigrants and foreigners and once said, "we're going to go and invade California. It's filled with, you know, people who shouldn't be here." *See* Moini Dep. at 786. Moini also describes Rowe as a "xenophobic" person who would react anytime someone discussed foreigners coming to the United States. *Id.* at 787.

To qualify as direct evidence, a statement or remark "must itself show racial [ ] bias in the [employment] decision." *Vatel*, 627 F.3d at 1247. Rowe's alleged statement about California and Moini's description of him as xenophobic at most show a bias against foreigners, not against a particular race. Moini cannot support his *race* discrimination claim with statements about national origin. *Accord Ndondji v. InterPark Inc.*, 768 F. Supp. 2d 263, 273 (D.D.C. 2011). And even if the Court assumes a racial animus behind those statements, they lack "any temporal or substantive

relationship to" the denial of tenure. *Samuel v. Metro. Police Dep't*, 258 F. Supp. 3d 27, 47 (D.D.C. 2017) (cleaned up). Moini does not try to argue otherwise. With no nexus to the tenure denial, Rowe's statements "are not alone sufficient to withstand a motion for summary judgment." *Telesford v. Md. Provo-I Med. Servs., P.C.*, 204 F. Supp. 3d 120, 128 (D.D.C. 2016) (cleaned up).

More, Moini's arguments about Rowe—whether it be about Rowe's alleged statements or his conduct elsewhere in the tenure review process—suffer from a "significant initial hurdle." *Vatel*, 627 F.3d at 1247. Rowe *supported* Moini's hiring, *see* Def.'s SMUF ¶ 21, and wrote to the CCAS Committee that he "strongly endorse[d]" Moini's application for tenure, Def.'s MSJ, Ex. 3D at 160. After that committee and other reviewers decided to deny tenure, Rowe interceded before the FSEC. He urged that body not to put much stock in Moini's teaching evaluations, attesting to the clarity, concision, and logical progression of Moini's lectures, which Rowe himself had observed. *See* Def.'s MSJ, Ex. 3F, ECF No. 48 at 166. He also explained that Moini's low evaluations resulted from extenuating circumstances, such as a questionable teaching model for some courses, that Rowe felt had "contributed to the low ratings of Professor Moini." *See id.* The FSEC agreed with him enough to recommend an extension of Moini's tenure clock rather than an outright denial of tenure. *See* Def.'s MSJ, Ex. 4I at 388.

"[I]t would be odd" for Rowe to overtly support Moini's tenure application in these many ways while simultaneously trying to deny him tenure because of his race. *Vatel*, 627 F.3d at 1247. Indeed, the evidence shows that Rowe supported Moini's tenure

application at every turn in the process. Moini's direct evidence, therefore, falls flat.

B. Indirect Evidence

Because there is no direct evidence to permit Moini to reach trial, the Court reviews his indirect evidence. Moini offers a host of arguments that the University's explanation was pretextual. The Court takes them in turn and concludes that none of them create a genuine issue of material fact.

1. The University's Explanation

Before those arguments, however, the Court first considers the University's explanation for denying tenure—that Moini "did not demonstrate the required excellence in teaching." Def.'s MSJ at 48. Recall that many of those who reviewed Moini's application had concerns about his teaching. The CCAS Personnel Committee said that Moini's teaching—based on his below-average student evaluation scores—"f[ell] well below" the Committee's expectation for "its tenured colleagues." Def.'s MSJ, Ex. 4G at 368. The Dean likewise had "serious reservations about [Moini's] teaching." Def.'s MSJ, Ex. 4H at 372. And the Provost said Moini "ha[d] not demonstrated excellence. Pl.'s MSJ, Ex. 50, ECF No. 53-6 at 1140. Plenty of other reviewers, including the then-President, echoed those concerns when they concurred with denial of tenure to Moini.

Indeed, Moini consistently scored below Department averages in "Overall Rating of the Instructor" for classes taught before he submitted his tenure application and during consideration of that application. Often, he was well below the mean:

Semester	Fall 2014	Spring 2015	Fall 2015	Spring 2016	Fall 2016	Spring 2017
Department Average	4.2	4.2	4.2	4.2	4.2	4.2
Moini's Scores	3.7, 3.7	2.7, 3.0	3.4, 4.4	2.1, 3.0	3.6, 3.6	2.4, 3.4

See Def.'s MSJ at 16–18.[20]

The President has thus made "an adequate evidentiary proffer" as to the University's justification. *Figueroa v. Pompeo*, 923 F.3d 1078, 1087 (D.C. Cir. 2019) (cleaned up). He has supported that justification with evidence that the Court "may consider at" summary judgment, including deposition testimony, supporting emails, and University records. *Id.* And that evidence supports the justification. Many individuals reviewed Moini's application in the tenure and grievance process. Those who supported denial of tenure consistently highlighted his deficiencies as a teacher, a fact supported by the student evaluations.

A jury presented with evidence of such consensus could reasonably find that the University's action "was motivated by" Moini's failure to meet the teaching standard. *Id.*

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[20] This trend continued after formal denial of Moini's tenure application. Over his final four semesters, the Department's teachers again averaged a score of 4.2 each semester. But Moini scored 3.2, 3.9, 2.2, and 3.1. *See* Def.'s MSJ at 19.

University records. *Id.* And that evidence supports the justification. Many individuals reviewed Moini's application in the tenure and grievance process. Those who supported denial of tenure consistently highlighted his deficiencies as a teacher, a fact supported by the student evaluations.

A jury presented with evidence of such consensus could reasonably find that the University's action "was motivated by" Moini's failure to meet the teaching standard. *Id.* (cleaned up). Not only is that a nondiscriminatory reason, it is "facially credible in light of the proffered evidence." *Id.* at 1088 (cleaned up).

2. The University's Explanation Was Not Pretextual

The Court turns then to the "central issue": Whether Moini has "produced evidence sufficient for a reasonable jury to find that the [University's] stated reason was not the actual reason and that the [University] intentionally discriminated against" Moini "based on his race." *Brady*, 520 F.3d at 495. To support his claim, Moini mainly argues that the University failed to follow its own procedures and gave favorable treatment to other professors and tenure candidates. He also makes other, less developed, arguments.

None of his arguments support an inference of pretext.

a. Moini's Prime Facie Case

For starters, Moini's prima facie case suffers from a serious flaw. Recall that he must be "a member of a racial minority" to have a § 1981 claim. *Wilson*, 417 F. Supp. 3d at 91. To make that

showing, Moini must identify "ethnic characteristics" specific to that racial minority. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

Throughout this case, Moini has said that he is Middle Eastern. *See* Pl.'s MSJ at 4, Moini Dep. at 821. But Moini provides little to no evidence about whether he has the kind of characteristics common to Middle Easterners. When asked to identify those attributes at his deposition, Moini said Middle Easterners "eat flat bread," "are sensitive," and "joke." Moini Dep. at 821. That is all. He then suggested that defense counsel "[g]o talk to a psychologist" or "a sociologist" about those characteristics. *Id.* And Moini denoted his ethnicity as "White" in a 2019 EEOC complaint. *See* Def.'s MSJ, Ex. 35, ECF No. 48 at 1051. So Moini not only fails to discuss what makes him Middle Eastern, he also has previously declined to identify that as his race. This is not enough.

To be clear, the Court does not determine now whether Moini has stated a prima facie case. *See Brady*, 520 F.3d at 494. But to deny summary judgment to the President, the Court must conclude that a jury could "infer . . . discrimination from all the evidence," including the "prima facie case." *Nurriddin v. Bolden*, 818 F.3d 751, 758–59 (D.C. Cir. 2016). Here, that evidence shows no attempt by Moini to define his race beyond some off-the-cuff comments about characteristics shared by people of many races. A jury considering "the total circumstances of the case" would confront the same evidence. *Hamilton v. Geithner*, 666 F.3d 1344, 1351 (D.C. Cir. 2012) (cleaned up). The Court then must also consider it.

b. Alleged Failure to Follow Established Procedures

Moini devotes much of his briefs to argue that various parts of the reviewing process failed to follow the University's "established procedures" for tenure. *Brady*, 520 F.3d at 495 & n.3. To be sure, an employer's failure to follow established procedures can give rise to pretext, but that failure "alone, may not be sufficient to support the conclusion that [the employer's] explanation for the challenged action is pretextual." *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (cleaned up). More, neither the Court nor a jury is a "super-personnel department" able to reevaluate the merits of a personnel decision. *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999) (cleaned up). Because of that limited review, the Court "may not second-guess an employer's personnel decision absent demonstrably discriminatory motive." *Hairston v. Vance-Cooks*, 773 F.3d 266, 272 (D.C. Cir. 2014) (cleaned up).

Moini presents insufficient evidence to show that the University had certain "established procedures" for tenure. The Court discusses separately the procedures from before his tenure application and those from during review of that application.

i. Pre-Application Procedures

Moini argues that the University should have provided him a mid-tenure review. *See* Pl.'s MSJ at 9–10. But none of the cited policies *required* such a review. The Department's Constitution directed a committee "to evaluate annually tenure-track faculty and inform them of their progress toward tenure." Def.'s MSJ, Ex. 3A, ECF No. 48 at 151. The key word

there is "annually." Moini received those annual reports. *See* Def.'s MSJ, Exs. 17–19. As for the College's 2013 Bylaws, they allowed departments to "establish their own procedures" for evaluating the progress of candidates for tenure. Def.'s MSJ, Ex. 4A, ECF No. 48 at 194.

Some policies apparently did require a mid-tenure review, at least for some candidates. The June 2015 update to the Faculty Code required each school and department to "establish and publish written procedures to provide reviews to guide faculty members concerning progress toward tenure." Faculty Code § IV(C)(3). The College responded later that year with procedures for reviews of every candidate "at the approximate mid-point of the period leading to their tenure review[.]" Pl.'s MSJ, Ex. 64, ECF No. 53-6 at 1185.

Moini pounces on the University's admission that "a mid-tenure review of [Moini] was not done[.]" Resp. to Pl.'s Rev'd First Req. for Adm'n, Pl.'s MSJ, Ex. 43, ECF No. 53-6 at 741. Unrebutted evidence shows, however, that relevant policies did not require a mid-tenure review for him. Before the College released the guidelines, a professor clarified that "since [Moini was] on a fast track," he "[would] not have an official" mid-tenure review. Pl.'s MSJ, Ex. 69, ECF No. 53-6 at 1201. An email from Weedn in April 2016 reiterated the same policy. *See* Pl.'s MSJ, Ex. 68, ECF No. 53-6 at 1199 ("3 year fast tracks usually do not have a mid-tenure review."). Moini provides no evidence of any other policy for fast-track tenure applicants for mid-tenure reviews.[21]

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[21] And even if the 2015 College procedures required mid-tenure reviews for fast-track applicants, the email evidence shows a norm under which the College did not give such reviews to fast-

Beyond Moini's arguments about formal mid-tenure reviews, he also says more generally that nobody from the University produced comments "about [his] teaching that [ ] discussed his progress toward tenure." Pl.'s MSJ at 18. The evidence says otherwise. One annual review identified issues with his teaching. *See* Def.'s MSJ, Ex. 18 at 916 ("Students' evaluations of Moini's teaching are a mixed bag."). And recall that Weedn informed Moini more than once of negative student comments about his teaching. *See* Weedn Dep. at 681. Moini himself knew about those negative evaluations and admitted reading them. *See* Def.'s MSJ, Ex. 18 at 907 ("My teaching evaluations show mixed results.").

Finally, despite the policy against a formal mid-tenure review, Weedn testified that he gave Moini an "informal" one. *See* Decl. of Victor Weedn ¶ 9, Pl.'s MSJ, Ex. 65, ECF No. 53-6 at 1191. During that conversation, Weedn discussed Moini's "teaching, publications, and grants." *Id.* So the evidence rebuts Moini's assertion that no one discussed with him the relationship between his teaching and his progress towards tenure.

In sum, the totality of the evidence shows that the University violated no policies when it failed to conduct a mid-tenure review of Moini. The policies either did not require one at all or did not apply to a professor like Moini on a fast track to tenure.

ii. Procedures During Review of Application

Next, consider Moini's arguments about the review of his tenure application. Some background is

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track applicants. That the College followed that norm does not support pretext even if it technically violated the procedures. *See Fischbach*, 86 F.3d at 1183.

required. In mid-2016—before Moini submitted his tenure application—the Provost instituted guidelines on what each application should include. *See* Def.'s Reply, Ex. 37A, ECF No. 58 at 48–55. Under "Teaching Effectiveness," those Provost Guidelines listed internal peer reviews and student feedback. *Id.* at 54. For the former, the Provost "encouraged" departments to provide reviews from a peer who had observed the candidate's teaching. *Id.* For the latter, the Provost listed "both scores and comments, provided by the department." *Id.* In a footnote, the Provost said anyone seeking more details should reference other guidelines from the University's Teaching and Learning Center. *See id.* at 53.

Issued in 2013, those guidelines (TLC Guidelines) differed slightly from the Provost's. *See* Def.'s Reply, Ex. 37B, ECF No. 58 at 57–60. *First*, they explicitly required internal peer reviews. *See id.* at 58 ("(Required) Internal Peer Reviews."). *Second*, they directed departments, when compiling student feedback, to "includ[e] comparisons with similar courses (and with similar enrollments) taught by others." *Id. Third*, they recommended student letters, including ones supplied by the candidate and others sought "by [the] department/school." *Id.*

Moini relies heavily on the TLC Guidelines. Based on those provisions, he faults the University for (1) not providing an internal peer review, (2) not comparing his student evaluations with those of Rowe, (3) not providing an external peer review, and (4) removing from his application student letters supplied by him. *See* Pl.'s MSJ at 21–22.

These arguments founder on unrebutted testimony from the Provost and Rowe. The Provost testified that the Teaching and Learning Center "had authority to recommend components for tenure

dossiers, but no authority to mandate items to be included." Supp. Decl. of Forrest Maltzman ¶ 8, Def.'s Reply, Ex. 37 (Maltzman Supp. Decl.), ECF No. 58.[22] Rowe likewise testified that the TLC Guidelines were "non-binding" and that "administrators had discretion to determine how best to move a tenure and promotion dossier forward." Supp. Decl. of Walter Rowe ¶ 5, Def.'s Reply, Ex. 38, ECF No. 58.[23] Moini never suggests otherwise, either on the mandatory nature of the TLC Guidelines or whether the College followed them as a general practice.

So too for the Provost Guidelines. The Provost himself testified that he never intended to bind the University to every part of those guidelines. *See* Maltzman Supp. Decl. ¶ 5. More important, he testified that the University itself did not strictly follow them. He explained that the University had "approved tenure in cases where the application dossier did not comply with many requirements in the Guidelines." *Id.* Moini again does not refute that statement, forcing a reasonable factfinder to conclude that the Provost Guidelines were not "established policies and procedures."

This brings us to the University's use of student evaluations. Moini says that the school "solely relied on student evaluations" from his graduate seminar and refused to rely on any other objective metrics used to measure teaching excellence. Pl.'s MSJ at 7.

The Court cannot agree with this factual characterization. Every reviewer to deny tenure cited Moini's below-average student evaluations, which

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[22] Available at pages 40–46.

[23] Available at pages 69–70.

covered classes beyond the graduate seminar. Remember, he taught more than just that one course. To be sure, the reviewers excerpted comments from the reviews of that course. But nothing suggests that reviewers dismissed evaluations from other courses (which were also mostly below Department averages, *see* Def.'s MSJ at 16–19). So the Court finds little support for Moini's contention that reviewers relied "solely" on evaluations from that one course.

As to possible pretext, Moini provides no established policy or procedure prohibiting the University from relying on student evaluations.[24] The College Bylaws that Moini cites for other arguments say that judgments about academic excellence "cannot be reduced to a quantitative formula." Def.'s SMUF ¶ 32. Although an imperfect tool, student evaluations are a key part of that judgment. Teaching is about instruction of students. A student's complaints about a teacher's instruction therefore go directly to the heart of teaching excellence.

No reasonable jury could fault the University for relying on them to analyze teaching excellence. And in any event, a jury is not a "super-personnel department" that can revisit that decision, *Barbour*, 181 F.3d at 1346 (cleaned up), "absent demonstrably discriminatory motive," *Hairston*, 773 F.3d at 272

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[24] At one point, Moini cites a University document where the FSEC Chair asked for information beyond student evaluations to evaluate teaching. *See* Pl.'s MSJ, Ex. 72, ECF No. 53-6 at 1208. Moini portrays this document as University or College policy, but it lists only "[r]ecommendations" and its author testified that he was "merely suggesti[ng]" what types of information could be helpful. Dep. of Paul Duff, Def.'s MSJ, Ex. 11, ECF No. 48 at 708. That is hardly an "established" policy.

(cleaned up). Courts are especially wary of second-guessing personnel decisions in the academic context. *See Harris*, 2021 WL 439952, at *10. The mere use of teaching evaluations to judge teaching excellence does not point to an illicit motive, particularly when Moini's scores were consistently below average, a fact noticed and cited by almost every reviewer.[25] *Cf. id.* at *11 (rejecting retaliation claim brought by professor regarding dean's low evaluations where dean consistently ranked subordinates harshly).

Moini identifies one anomaly that requires explanation. Although he submitted letters from former students with his application, the Department asked him to remove those letters. *See* Def.'s SMUF ¶ 145. The Department instead asked former students to submit their letters directly without going through Moini. *See id.* When two such

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[25] Relying again on the TLC guidelines, Moini argues that the reviewers should have compared his student evaluations with Rowe's for the graduate seminar. *See* Pl.'s MSJ at 21. He thinks that had the reviewers done so, they would have seen that Moini got the same scores as Rowe and then would have dismissed Moini's negative evaluations as a symptom of the course structure, not his teaching. The actual evaluations do not support his assertions. True, Rowe received ratings of 2.9 in two semesters when he taught the graduate seminar by himself. *See* Pl.'s MSJ, Ex. 95, ECF No. 53-6 at 1352; *id.* Ex. 96, ECF No. 53-6 at 1355. Those scores mirror what Moini received in the same class. But once students could evaluate teachers separately, Rowe received a noticeably higher score than Moini. In the graduate seminar, Moini received a 2.1 rating, compared to Rowe's 3.4, in Spring 2016. *See* Def.'s SMUF ¶ 203. And in a different class co-taught that semester by the pair, Moini got a 3.0 rating and Rowe got a 4.7. *See id.* From this and Moini's below-average scores in almost every other course, the University could reasonably conclude that Rowe was a better teacher than Moini.

letters came in, Rowe decided not to submit them. *See* Dep. of Walter Rowe, Def.'s MSJ, Ex. 9 (Rowe Dep.), ECF No. 48 at 640. For Moini, this oversight shows an intentional effort by the Department to withhold "any teaching related evidence that could have helped Moini to showcase his teaching." Pl.'s MSJ at 23.

Recall again that Moini has pointed to no established policies or procedures on the University's use of letters from former students. Even if he had, however, the evidence shows no discriminatory motive. The removal of student letters was so that the University could see "independent and candid" reviews from Moini's former students, not ones that he had pre-screened. Def.'s SMUF ¶ 145. Rowe also testified that submitting only two letters "would highlight the problems with [Moini's] teaching." Rowe Dep. at 640. Given Moini's decades of experience as an educator, Rowe was likely correct that so few letters might cast a negative light on Moini rather than a positive one. And as discussed, these claims of pretext ignore Rowe's ultimate and unflagging support of Moini's application for tenure.

Finally, Moini points out that one of the reviewers on the CCAS Committee "had an incident of racism" and did not recuse herself from review of his tenure application. Pl.'s MSJ at 26. That allegedly racist incident, however, occurred in 2018, one year *after* the CCAS Committee voted to deny Moini tenure. *See generally* Pl.'s Reply, Ex. S1, ECF No. 63-2 at 5–6. So even under Moini's version of the University's procedures, the reviewer need not have recused herself based on an incident that had yet to

happen.[26] And because the incident happened after the decision to deny tenure to Moini, it has no obvious connection to that decision.

c. Alleged Comparators

Now for Moini's alleged comparators. "Evidence of an employer's more favorable treatment to similarly situated employees without the plaintiff's protected characteristic may indicate discriminatory animus." *Breiterman v. U.S. Capitol Police*, 15 F.4th 1166, 1174 (D.C. Cir. 2021). But for another employee to be similarly situated, a plaintiff must show "that all of the relevant aspects of his employment situation were nearly identical to those of the other employee." *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015) (cleaned up).

Moini points to Rowe's promotion to Department Chair.[27] According to Moini, Rowe got a promotion even though he "received similarly poor

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[26] True, the presence of this reviewer on the Committee could support Moini's assertions of pretext. But several independent levels of review occurred after the CCAS Committee. All of them cited Moini's teaching inadequacies as the reason to deny tenure. And there is no evidence that this allegedly biased reviewer had any contact with later reviewers. Given the lack of contact and that later reviewers agreed with the CCAS Committee about Moini's teaching, the evidence of one potentially biased early reviewer does not render the University's explanation pretextual. *Accord Parker v. Nat'l R.R. Passenger Corp.*, 214 F. Supp. 3d 19, 27 (D.D.C. 2016) (granting summary judgment when, despite contact between biased supervisor and higher-level reviewer, the later review did not depend on the supervisor's statements).

[27] Indeed, Moini claims that the University "rewarded" Rowe with the promotion for his efforts in discriminating against Moini. *See* Pl.'s MSJ at 23.

student evaluations" in the graduate seminar. Compl. ¶ 57. That disparate treatment shows, he says, discriminatory animus.

But the promotion criteria for the two positions were very different. A professor seeking tenure must show teaching excellence. The criteria for a Department Chair include no similar standard. *See* Def.'s SMUF ¶ 23. In fact, the position of tenured professor and Department Chair have little relationship at all. One could even become Chair without being tenured. *See* Weedn Dep. at 660 (noting that Rowe had once been Department Chair despite not having tenure). Rowe and Moini thus were subject to different performance standards, making the "relevant aspects" of their employment situations not nearly identical. *Burley*, 801 F.3d at 301; *see Coats v. DeVos*, 232 F. Supp. 3d 81, 95 (D.D.C. 2017) (rejecting potential comparator because he was subject to lower performance standards than the plaintiff).

For the same reason, one of Moini's other comparators is inadequate. Moini points to Dr. Andrew Smith, a non-Middle Eastern faculty member who, despite poor student evaluations, received tenure in 2014. *See* Pl.'s MSJ at 45–47. The year is all that matters. Before 2015, the University required merely "professional competence" in teaching for a candidate to receive tenure. *See* Def.'s MSJ, Ex. 4C § IV(C)(1), ECF No. 48 at 241. So Smith's elevation to tenure occurred under a different standard than the one applicable to Moini two years later. Smith is therefore not an appropriate comparator either.

Closer to the mark is Dr. Antwan Jones, Moini's other proposed comparator.[28] *See* Pl.'s MSJ at 43–45. Jones received tenure in 2016 despite below-average student evaluations. Based on the evidence, Jones had an average score of 3.43, lower than the Department-wide average of 4.16.[29] In contrast, Moini had a pre-application average score of 3.21. *See* Def.'s MSJ at 16–17.

Despite these somewhat similar scores, the evidence confirms that Jones is not a valid comparator to Moini. For one thing, Jones taught in a different department than Moini. *See* Def.'s Reply, Ex. 37C, ECF No. 58 at 62. Jones therefore had a different set of supervisors review his tenure application at the departmental level. *See Rassa v. Amtrak*, 850 F. App'x 1, 3 (D.C. Cir. 2021) (finding another employee not similarly situated to the plaintiff in part because the two "worked under different supervisors"); *Gulley v. District of Columbia*, 474 F. Supp. 3d 154, 167 (D.D.C. 2020) (same). More, although Jones's student evaluations mirror Moini's, he taught more courses and more students than Moini did. The two thus had "different roles," rendering them inapt comparators. *Burley*, 801 F.3d at 301.

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[28] Moini first mentions Smith and Jones in his motion for summary judgment, which is likely impermissible. *Accord Mosleh v. Howard Univ.*, No. 19-cv-0339 (CJN), 2022 WL 898860, at *7 (D.D.C. Mar. 28, 2022). But the Court analyzes the new comparators anyway.

[29] For Jones's average scores, the Court uses the numbers provided in Moini's brief, *see* Pl.'s MSJ at 44–45, even though the record corroborates only some of them. One of Moini's exhibits includes some of Jones's scores, but not all of them. *See* Pl.'s MSJ, Ex. 84, ECF No. 53-6 at 1237–1246.

Finally, reviewers of Jones's application noted that his evaluations showed an "upward trajectory" in his teaching. Def.'s MSJ, Ex. 37C at 63; *see also* Pl.'s MSJ, Ex. 86, ECF No. 53-6 at 1251. Indeed, the numbers provided by Moini show the same trend. Jones averaged a 3.3 rating over his first eight evaluations, and a 3.55 rating over his second eight evaluations. *See* Pl.'s MSJ at 44–45. In contrast, Moini's scores were relatively flat. Over the eight evaluations preceding his tenure application, Moini received a 3.275 average rating for the first four and a 3.225 for the second four. *See* Def.'s MSJ at 16–17. And after receiving two ratings of 3.7 in his initial two classes, Moini received one rating above that score before applying for tenure. *See* Def.'s MSJ at 17 (showing a 4.4 rating for one class in Fall 2015). As other courts have held, those signs of improvement are a relevant distinction between comparators. *See Coats*, 232 F. Supp. 3d at 95; *Anakor v. Archuleta*, 79 F. Supp. 3d 257, 263–64 (D.D.C. 2015), *aff'd*, 2015 WL 5210455 (D.C. Cir. Sept. 3, 2015).

Thus, none of Moini's proffered comparators present employment situations that were "nearly identical" to his. *Burley*, 801 F.3d at 301. He therefore fails to show pretext based on those comparators.

d. Other Arguments on Pretext

Now consider Moini's grab bag of other arguments. Moini first recites several demographic statistics about the faculty and students in the Department. *See* Pl.'s MSJ at 11 ("[F]ull-time faculty in the Department currently consists of all Caucasian men."); Pl.'s Reply at 6, ECF No. 63 ("[E]xcept for a strong Jewish minority, the

percentages of other minorities were significantly below the national averages."). "[W]ithout more," this kind of demographic information "does not support an inference of discrimination." *Bolden v. Clinton*, 847 F. Supp. 2d 28, 35 (D.D.C. 2012).

So too for the University's alleged admission of a racist climate on campus. In 2018, the President sent a campus-wide email "about the need to try to improve race relations on campus." Def.'s SMUF ¶ 271. The email referred to concerns by minority students and faculty about the University community's lack of inclusivity. *See id.* Put simply, an email sent after the tenure denial about general racism has little to do with Moini's tenure application. "[I]t is inappropriate to rely on extrapolation from general evidence of discriminatory episodes when there is available specific evidence directly relevant to the particular plaintiff." *Williams v. Boorstin*, 663 F.2d 109, 115 n.38 (D.C. Cir. 1980).

Lastly, Moini says that he received "three merit raises." Pl.'s MSJ at 23. Such indicia of positive performance might support an inference of pretext. *See, e.g., George*, 407 F.3d at 414 (finding employer's justification to be pretextual in part because employer gave positive performance reviews to the plaintiff). But Moini gives no evidence about these raises, including their size or timing. He bears the burden to make that evidentiary showing. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). The Court is not required "to sift through hundreds of pages of" the record "to make [its] own analysis and determination of what may, or may not, be a genuine issue of material disputed fact." *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988).

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In sum, Moini has not shown evidence to support an inference of pretext or discrimination by the University. Beyond the flaw in his prima facie case, his proffered comparators were not similarly situated to him. And despite his consistent entreaties, Moini nowhere suggests a policy or procedure that the University violated during the tenure application process. He thus fails to create an inference that the University's reason for denying tenure was pretextual. The Court will grant summary judgment to the President on Count III.

IV. CONTRACTUAL CLAIMS

Next up are Moini's breach of contract claims. He largely repackages his discrimination claim, arguing that the University violated various contractual obligations before he applied for tenure, during review of his application, and during the grievance process.

Breach of contract under D.C. law requires (1) a valid contract; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). The statute of limitations for these claims is three years. *See* D.C. Code § 12-301(7). When contract claims arise in the academic context, however, the Court "generally give[s] deference to the discretion exercised by university officials." *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006).

A. Claims Related to Pre-Application Period

The Court starts with Moini's pre-application claims, which are barred by the statute of limitations. Much like his discrimination claims, Moini argues that the University breached its contract by not giving him a mid-tenure review and not informing him of his teaching deficiencies. *See* Pl.'s MSJ at 36 (referencing discussion of these facts in section on discrimination claims). For statute-of-limitations purposes, those claims accrue when Moini's review was due and not provided, not when the University formally denied tenure. *See Wright v. Howard Univ.*, 60 A.3d 749, 752–53 (D.C. 2013).

Recall that the mid-tenure guidelines suggested mid-tenure review "at the approximate mid-point of the period leading to [ ] tenure review[.]"[30]Pl.'s MSJ, Ex. 64 at 1185. Moini started on January 1, 2014, with a three-and-a-half-year tenure clock. Thus, the midpoint of his period would be in early October 2015. That date is easily more than three years before Moini sued in October 2019. So any claim about a mid-tenure review is time-barred, assuming that review should have occurred, as the policy says, at the midpoint.

In any event, all pre-application claims are time-barred. Moini argues in essence that the lack of pre-application feedback prevented him from correcting deficiencies in his teaching performance and taking timely steps to meet the tenure criteria. *See Wright*, 60 A.3d at 752–53; *see also* Compl. ¶ 75 (asserting that University policies "recommend" pre-application feedback "with sufficient time for the Prof[essor] to make adjustments or corrections to

[30] The Court assumes for now that those guidelines are contractually binding on the parties.

address those concerns before a decision is made in the formal tenure review process").

That feedback, however, became irrelevant once he applied. So his pre-application claims, regardless of exact midpoints or other timetables, accrued at the latest when he applied for tenure. *See Mawakana v. Bd. of Trustees of the Univ. of the Dist. of Colum.*, 926 F.3d 859, 869 (D.C. Cir. 2019) (holding that claims about university's obligations during a particular academic year accrued on the final day of that academic year). He did so in September 2016—more than three years before suing. So no matter when exactly any pre-application claims accrued, they all fall outside the three-year limitations period, and are thus time-barred under D.C. law.

B. Claims Related to Review of Application

Next, consider Moini's claims about the review of his application. He says the Provost "both during the tenure denial and grievance process" should have considered various extenuating circumstances, like the relative newness of the graduate seminar and the consistency between Moini's and Rowe's evaluations. Pl.'s MSJ at 40. But Moini suggests no *contractual* breach there. He points to no University policy requiring consideration of factors beyond the Faculty Code's criteria of "excellence in scholarship, teaching, and engagement in service." Faculty Code § IV(C)(1).

Moini's Complaint points to the various guidelines on tenure applications. *See* Compl. ¶ 77. Recall that both the TLC Guidelines and the Provost Guidelines discuss comparing an applicant's student evaluations with other courses and professors. Moini

suggests that the Provost should have considered the consistency between Moini's and Rowe's evaluations. *See* Pl.'s MSJ at 40.

But no evidence shows that those guidelines are contractually binding on the parties. By his signature on the appointment letter, Moini agreed as part of his contract to the Faculty Code and the Faculty Handbook "and any subsequent changes or amendments" to them. *See* Def.'s MSJ, Ex. 22 at 950. Recall that the evidence shows that the University never intended those tenure guidelines to be part of the Faculty Code or the Faculty Handbook.[31] *See* Maltzman Supp. Decl. ¶¶ 5, 8. Moini's complaints in this area thus reduce to an attempt to re-do the tenure and grievance process. That effort does not belong here: Neither the Court nor a jury acts as a "super-personnel department." *Barbour*, 181 F.3d at 1346 (cleaned up).

So too for Moini's contention that the Provost did not follow the University's definition of "compelling reason." *See* Pl.'s MSJ at 37; Compl. ¶ 78. The Faculty Code lists as compelling reasons "[f]ailure to conform to tenured published tenure or promotion policies." Faculty Code § IV(E)(1)(ii). Moini's own inability to, in the judgment of the Provost, show excellence in teaching was a failure to meet published tenure criteria. The Provost said as much during his tenure review, *see* Pl.'s MSJ, Ex. 50,

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[31] Moini says otherwise. He asserts that the Code prohibits "[f]ailure to conform to published tenure or promotion policies, procedures, and guidelines." Pl.'s MSJ at 35. That clause does appear in the Code. But not as a proscription against the University. It is instead a basis on which higher-level tenure reviewers may "independently concur or nonconcur" with a tenure recommendation. Faculty Code § IV(E)(1). So Moini misstates the Code's requirements as to tenure policies.

and his grievance review, *see* Def.'s MSJ, Ex. 4O. Moini's suggestions to the contrary simply ignore the Provost's written opinions on the subject.

Moini includes in his brief two other contractual claims, both involving the Department's request to extend his tenure clock. *See* Pl.'s MSJ at 36–37. Neither of these claims appeared in Moini's Complaint. The Court rejects them on that basis as untimely. *See Wilson*, 417 F. Supp. 3d at 97.

C. Claims Related to Grievance Process

Moini makes two contractual claims related to the grievance process.

First, he alleges that the Vice Provost had an improper *ex parte* communication with the Hearing Committee. *See* Pl.'s MSJ at 41. This allegation implicates the Faculty Code, which requires parties to "avoid ex parte communications bearing on the substance of the dispute." Procs. for Impl. of the Faculty Code § (E)(b)(7). The relevant facts are these: Moini first met with the Committee by himself—*ex parte*. *See* Def.'s SMUF ¶ 180. The Committee later realized that they should have held "a single hearing," with both sides present. Pl.'s MSJ, Ex. 83, ECF No. 53-6 at 1236. To facilitate that hearing, the Committee emailed the recording of its Moini-only proceeding to the Vice Provost. *See* Pl.'s MSJ, Ex. 90, ECF No. 53-6 at 1330.

The parties' factual recitations diverge here. Moini says that the Vice Provost responded to that email on the same day, allegedly engaging in secret communications. *See* Pl.'s MSJ at 42. The evidence contains no such emails. The only emails between the Vice Provost and the Committee occurred two months later, when the Vice Provost discussed

confidentiality of Moini's tenure reviewers. *See* Def.'s MSJ, Ex. 4N, ECF No. 48 at 438. The emails discuss Moini's grievance process, but nowhere does the Vice Provost advocate for the Committee to find in the University's favor. He is concerned only with the privacy interests of reviewers who submitted materials for Moini's tenure application. *See id.* Such conversations are not about the "*substance* of the dispute," and therefore do not violate the Faculty Code. Procs. for Impl. of the Faculty Code § (E)(b)(7) (emphasis added).

Second, Moini says the University denied him the right to "inspect and copy" before his grievance hearing "all relevant documents in the control of the other party and not privileged." Procs. for Impl. of the Faculty Code § 4(c)(3). He says that the University should have provided him with all of Rowe's student evaluations. *See* Pl.'s MSJ at 43.

Moini has a point, but the evidence shows that he either abandoned his contractual right or did not pursue it properly. He asked the Hearing Committee Chair to "ask the administration" to provide all of Rowe's past student evaluations. Def.'s MSJ, Ex. 29, ECF No. 48 at 998. The Chair advised him that such new information might not add much to Moini's case. *See id.* Nowhere did the Chair imply or suggest that Moini could not request or see those evaluations. He suggested only that Moini might not need them. Moini agreed, deciding (incorrectly) from this response that "the committee had already decided in [his] favor." Moini Dep. at 814. So he "really d[id]n't need, therefore[,] more information." *Id.*

Based on this evidence—and Moini suggests no other evidence—Moini relinquished the right to inspect and copy all relevant documents. Part of the problem is that he made his request of the Hearing

Committee, not of the University, who was "the other party" in the proceeding. *See* Procs. for Impl. of the Faculty Code § 4(c)(3); *see also id.* § 4(a)(2) ("[A] grievance may only be maintained against *the university* for official acts.") (emphasis added). The University therefore never blocked his access.

In sum, Moini has not created a factual issue as to the University's contractual obligations. Some of his claims are barred by the statute of limitations and others rely on noncontractual documents. Still others show that the University did not violate its contractual obligations. Based on this evidence, the Court holds that no reasonable jury could find that the University acted arbitrarily and capriciously, breached a contract, or violated the implied contractual covenant of good faith and fair dealing. The Court will therefore grant summary judgment to the President on Counts II, III, and IV.

V. CONCLUSION

Moini may be right that the University put inordinate weight on student evaluations. And perhaps the classes he taught were particularly susceptible to harsh evaluations. But the University, like all employers, has wide latitude in how it evaluates and promotes its employees. Moini has failed to undermine the University's evidence that it did not act discriminatorily in its tenure decision, and that is what matters here. The Court will grant the President's motion for summary judgment and will deny Moini's cross-motion. A separate Order will issue.

Dated: May 13, 2022
TREVOR N. McFADDEN,
U.S.D.J.