IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRAD R. JOHNSON, DR.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
RAYMOND O. HEIMBACH, et al.,	:	**No. 03-2483**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **November 25, 2003**

Dr. Brad R. Johnson, a faculty member of Kutztown University of the Pennsylvania State System of Higher Education ("Kutztown"), brings this action against Raymond O. Heimbach, Theodore A. Hartz, Thomas J. Grant, Linda K. Goldberg, Norman C. Sigmond, David D. Wagaman, Jonathan K. Kramer, Keshav Gupta, Phillip R. Evans, and Donald L. Werley (collectively "Defendants"[1]) regarding a dispute that arose between the parties regarding Plaintiff's peer evaluation process. Plaintiff alleges violations of the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), (d) (2003), the First and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983, and breach of contract under state law. Presently before the Court is Defendants' motion to dismiss Plaintiff's Amended Complaint. For the reasons set forth below, I grant Defendants' motion.

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[1] Plaintiff has identified Defendants Heimbach, Sigmond, Wagaman, Kramer, Gupta, Evans, and Werley as professors at Kutztown. (Am. Compl. ¶¶ 3, 7-12.) Defendant Hartz is the Dean of the College of Business (Am. Compl. ¶ 4), Defendant Grant is the Chair of the Department of Accounting and Finance, and Defendant Goldberg is the Provost/Vice President Academic Affairs (Am. Compl. ¶¶ 5,6). In the Amended Complaint, Plaintiff often refers to "Defendants" without specifying which of the Defendants carried out the alleged action.

I. BACKGROUND

Plaintiff alleges that between May 1, 2002 and July 16, 2002, Defendants induced Plaintiff, via wire and mail communications, to leave his job at Governors State University, University Park, Illinois and join the faculty at Kutztown. (Am. Compl. ¶ 20.) Kutztown is a member of the Pennsylvania State System of Higher Education that has a collective bargaining agreement ("CBA") with the Association of Pennsylvania State College and University Faculties. (*Id.* ¶ 13.) In September 2002, Plaintiff joined the Department of Accounting and Finance in Kutztown's College of Business. (*Id.* ¶ 20.)

Thereafter, Plaintiff alleges, due to conflicting views regarding teaching methodology and accreditation of Kutztown's College of Business, Defendants attempted to force Plaintiff out of his position by establishing a series of evaluative processes that failed to adhere to the technical requirements of the procedure for peer evaluations. (*Id.* ¶ 21.) Additionally, Defendants submitted negative evaluations of Plaintiff based on "false perceptions of in-class observations" and ultimately recommended non-renewal of his employment contract. (*Id.*) Plaintiff objected in writing to the process by which Defendants conducted their peer evaluation and reached the decision to recommend non-renewal, stating that this process violated the CBA. (*Id.* ¶ 21(b)(4).) Despite these objections, Defendant Grant, the Chairperson of the Department of Accounting and Finance, prepared a Performance Rating Report (the "Performance Report") in which Plaintiff was given a rating of unsatisfactory. (*Id.* ¶ 21(c)(3).)

Defendant Grant provided Plaintiff an opportunity to discuss this evaluation but ultimately, declined to reconsider his overall rating of unsatisfactory. (*Id.* ¶ 21(c)(4).) Shortly thereafter, Plaintiff objected in writing to the entire process leading up to his Performance Report, including

Mr. Grant's reliance on the peer evaluations. (*Id.* ¶ 21(c)(3)(a).) Based on the peer evaluations and the negative Performance Report, Defendant Hartz, Dean of Kutztown's College of Business, recommended that Plaintiff's contract not be renewed. (*Id.* ¶ 21(d)(2)(a).) Plaintiff asserts that Defendant Hartz's decision was exclusively based on Plaintiff's perceived lack of congeniality and the negative peer evaluations and that Defendant Hartz failed to take into consideration his classroom materials or his "significant and substantive" activities. (*Id.* ¶ 21(d)(2)(b) &(c).)

Pursuant to the CBA, Plaintiff appealed Defendant Hartz's evaluation to Kutztown's Provost, Defendant Goldberg. (*Id.* ¶ 21(d)(3).) Defendant Goldberg and the faculty union Grievance Chairperson met with Plaintiff to discuss the grievance. (*Id.* ¶ 21(e)(1).) Defendant Goldberg stated that she would review Plaintiff's retention portfolio and examine his allegations. (*Id.*) She also advised Plaintiff that she would meet with department faculty and report her findings at a later meeting. (*Id.*) Thereafter, the President of Kutztown renewed Plaintiff's contract. (*Id.* ¶ 21(e)(2).) Defendant Goldberg never held the meeting as promised because she contended that while "the evaluations conducted by members of [Plaintiff's] department and the Dean were conducted in an arbitrary and capricious manner," (*Id.* ¶ 21(e)(2)), the issue became moot when the President renewed Plaintiff's contract (*Id.* ¶ 21(e)(3)).

Since the renewal of Plaintiff's contract, members of the department have "exhibited conduct toward Plaintiff extending from hostile and condescending to uncontrolled rage." (*Id.*) Plaintiff alleges that Defendants' conduct "has resulted in damage to Plaintiff's professional reputation and Plaintiff's ability to perform his duties as an Associate Professor of Accounting." (*Id.*) Furthermore, Plaintiff states that "[u]pon information and belief, through wire communications, Goldberg influenced said department members to engage in such conduct." (*Id.* ¶ 21(e)(4)(a).) Plaintiff

contends that this conduct includes the following acts: (1) Defendant Grant interrupted a conversation and criticized Plaintiff in a "hostile and condescending tone" accompanied by "aggressive mannerisms" (*Id.*); (2) Defendant Gupta called Plaintiff "an idiot" in front of students (*Id.* ¶ 21(e)(4)(a)); (3) When Plaintiff confronted Defendant Evans about not being a neutral evaluator, Defendant Evans responded, "Get the fuck out of my office" (*Id.* ¶ 21(e)(4)(d)); and (4) Defendant Sigmond also exhibited a variety of hostile and condescending mannerisms toward Plaintiff (*Id.*).

As a result, Plaintiff filed his Amended Complaint, alleging that Defendants: (1) acted as an enterprise and engaged in racketeering activity to fraudulently induce Plaintiff to leave his job and join the faculty of Kutztown; (2) conspired to commit such activity; (3) violated Plaintiff's "Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clause of the Fourteenth Amendment"; and (4) violated Plaintiff's constitutionally protected right to free speech with their negative performance evaluations. (*Id.* at ¶ ¶ 22-85.) Accordingly, Plaintiff brings claims under the civil RICO statute, 18 U.S.C. § 1962(c) (Count One) and 18 U.S.C. § 1962(d) (Count Two), 42 U.S.C. § 1983 for violations of his Fourteenth Amendment Due Process rights (Count Three) and his First and Fourteenth Amendment rights (Count Four); and state law for breach of contract (Count Five).

II. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party. *Bd. of Trs. of Bricklayers & Allied Craftsman Local 6 of N.J. Welfare*

Fund v. Wettlin Assoc., Inc., 237 F.3d 270, 272 (3d Cir. 2001). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41,45-46 (1957)). While keeping this standard in mind, a court must read a complaint submitted by a pro se plaintiff liberally and apply a less stringent standard. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972); *Gibbs v. Roman*, 116 F.3d 83, 86 n.6 (3d Cir. 1997).

III. DISCUSSION

A. Counts One and Two: Civil RICO

In Counts One and Two, Plaintiff alleges that Defendants have violated the civil RICO statute, 18 U.S.C. § 1962 (c) and (d). Section 1962(c) of the RICO statute provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]

18 U.S.C. § 1962(c) (2003). Similarly, 18 U.S.C. § 1962(d) makes it unlawful to "conspire" to violate § 1962(c). Thus, to make out a claim under § 1962(d), a plaintiff must first establish his § 1962(c) claim. *Annulli v. Panikkar*, 200 F.3d 189, 198 (3d Cir. 1999).

In order to state a claim under § 1962(c), Plaintiff must allege each of the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Camiolo v. State*

Farm Cas. Co., 334 F.3d. 345, 364 (3d Cir. 2003) (*quoting Sedima, S.P.R.. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). "A pattern of racketeering activity 'requires at least two acts of racketeering activity[.]'" *Id.* (*citing* 18 U.S.C. §§ 1341, 1343, 1961). Under 18 U.S.C. § 1961(1), racketeering activity is defined as "'any act which is indictable' under several provisions of the federal crimes code, including mail and wire fraud under 18 U.S.C. §§ 1341, 1343.'" *Id.* (*citing* 18 U.S.C. § 1961(1)). When a plaintiff alleges the predicate acts of racketeering activity that sound in fraud, such as mail or wire fraud, the pleading requirement of Federal Rule of Civil Procedure 9(b) applies and a court must determine whether plaintiff has plead with particularity the "circumstances" of the alleged fraud "in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard against spurious charges of immoral and fraudulent behavior." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984); *see also Rose v. Bartle*, 871 F.2d 331, 356 n.33 (3d Cir. 1989).

Additionally, "a RICO plaintiff 'only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.'" *Camiolo*, 334 F.3d. at 365 n.15 (*quoting Sedima*, 473 U.S. at 496). Such injury excludes damages as a result of personal or emotional injury, *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991), must be specific or quantifiable, *Maio v. Aetna Inc.*, 221 F.3d 472, 495 (3d Cir. 2000), and must have resulted in "tangible financial loss to plaintiff." *Maio*, 221 F.3d at 483 (*citing Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (en banc)). As such, a complaint does not adequately plead a RICO violation unless it shows damage to business or property with some certainty; if the claimed injury is speculative, it is not ripe for adjudication. *See id.* at 495 (stating dismissal is appropriate

when injury was "too speculative" in nature).

Even construing his Amended Complaint in a light most favorable to Plaintiff, assuming all facts in the Amended Complaint to be true, and affording him all leeway as a pro se plaintiff,[2] Plaintiff has failed to state a claim under RICO. First, Plaintiff has failed to allege that he has standing to bring suit under RICO because he has failed to allege injury sufficient to make out a claim. In his Amended Complaint, Plaintiff admits that despite the alleged racketeering conduct, his contract was renewed for another year. (Am. Compl. ¶ 21(e)(2).) Furthermore, Plaintiff does not allege any specific or quantifiable pecuniary loss. At most, Plaintiff asserts that the "conduct by Defendants is intolerable and has made working conditions so miserable for Plaintiff that Plaintiff was forced to acquire another position and will shortly resign his position at KU." (*Id.* ¶ 21(e)(5).) Similarly, in his response to Defendants' motion to dismiss, Plaintiff asserts he has been injured as he will lose the Kutztown University fringe benefit of paid tuition for spouse and dependants when (and if) he resigns. (Pl.'s Resp. at 2.) Finally, Plaintiff also contends that he "decided to wait" to resign to ensure the continuation of his medical benefits. (Am. Compl. ¶ 21(e)(5).) As Plaintiff has not alleged any specific pecuniary loss and the loss alleged - - his potential resignation - - is entirely speculative in nature, his Amended Complaint does not meet the standing requirements of RICO. *Maio*, 221 F. 3d at 495.

Second, even if Plaintiff alleged some specific injury, he has failed to plead fraud with the

[2] While Plaintiff is indeed proceeding pro se, the Court notes that he has obtained a juris doctor degree from Northwestern School of Law of Lewis and Clark College. (Defs.' Mem. of Law at 1 n.1.) However, Plaintiff's response to Defendants' Motion to Dismiss provides a mere superficial tour of the law, very little of which was applied to the facts of this case.

required particularity. Plaintiff seems to allege that the racketeering activity at issue in this case is mail and wire fraud, repeating throughout his Amended Complaint that Defendants have "executed schemes and artifices through mail and wire communications and fraud." Despite repeating these allegations, Plaintiff does not specify the circumstances or communications that would implicate any such fraud. For example, while Plaintiff contends that he was brought to Kutztown from his former job at Governors State University in part owing to messages carried to him through the mail and by wire, he failed to specify any such pieces of mail, telephone calls, or emails. Nor does he give any indication as to when or with whom such exchanges occurred. With respect to these allegations of mail and wire fraud, other than averring that Defendants carried on their alleged scheme through the mail and wire, Plaintiff's claims lack any specificity or particularity detailing the nature of the alleged fraud.

Plaintiff is not entitled to the inference that essential elements of mail and wire fraud occurred when the Rule 9(b) standard applies, as it does in this case. *Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network*, No. 99-4653, 2001 WL 41143, at * 3, 2001 U.S. Dist. LEXIS 284 at *12 (E.D. Pa. Jan. 18, 2001). The Third Circuit has counseled that the Rule 9(b) requirement can be satisfied by means other than delineating "date, place, or time" and can be fulfilled using "alternative means of injecting precision and some measure of substantiation into allegations of fraud." *Seville Indus.*, 742 F.2d at 791. However, even under this broad standard, the Amended Complaint fails to offer anything more than that Plaintiff and Defendants negotiated his salary and fringe benefits, and fails to connect this communication to some misrepresentation or scheme to defraud Plaintiff of money or property. 18 U.S.C. § 1341, 1343 (2003) (stating elements of mail and

wire fraud). Similarly, although Plaintiff describes with detail each Defendant's respective participation in the peer review evaluation process, he does not allege how these reviews were a scheme or artifice to defraud him rather than simply performed in the normal operation of Kutztown University. This Circuit has held that where a plaintiff's RICO claim contains allegations of fraud that are "simply 'normal business communications'" which contain no deceptive elements, and which may amount to a breach of contract but do not contain any "'deception that would bring it within the purview of the mail fraud statute,'" these claims should be dismissed. *Camiolo*, 345 F.3d at 365 (*quoting Kehr Packages, Inc. v. Fidelcor, Inc.*, 962 F.2d 1406, 1416-17 n.15 (3d Cir. 1991)). Thus, even taking into account that the Plaintiff is pro se, Plaintiff's failure to plead with *any* particularity is fatal to his claims under § 1942(c), and, consequently, Plaintiff's § 1962(d) claim also fails for this reason.

B. Counts Three and Four: 42 U.S.C. § 1983

Pursuant to 42 U.S.C. § 1983, Plaintiff alleges violations of his procedural due process rights under the Fourteenth Amendment and his right to free speech as a public employee under the First and Fourteenth Amendments. As discussed above, Plaintiff did not lose his job and consequently has suffered no financial or quantifiable loss. Rather, Plaintiff seems to allege that his reputation has been damaged in some way. Therefore, as discussed below, Plaintiff's § 1983 claims must also be dismissed.

First, the Supreme Court has held that "injury to reputation by itself was not a 'liberty' interest protected under the Fourteenth Amendment." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *see also Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 401-4 (3d Cir. 2000)

(discussing applicability of *Siegert* in substantive due process violations as well as procedural due process violations); *Kelley v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("Even financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest."). Further, while a claim of defamation might be actionable under state law, it is not a constitutional deprivation. *Siegert*, 500 U.S. at 233; *Boyanowski*, 215 F.3d at 401-4 (discussing that harm flowing from defamatory statements is not liberty interest protected by Due Process Clause). The Third Circuit has declared that "[e]mployment decisions . . . which do not terminate or abridge [a Plaintiff's] employment contract, and which could be litigated in state tribunals, do not constitute deprivations of property interests under the Fourteenth Amendment." *Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988).

Second, in order to state a retaliation claim under the First and Fourteenth Amendments, Plaintiff must allege that he engaged in protected speech and that this activity was a substantial factor in an adverse employment action against him. *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 885 (3d Cir. 1997). "Retaliatory conduct other than discharge or refusal to rehire is [prohibited] only if it . . .'adversely affects his status as an employee.'" *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997) (holding that "the alleged 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' suffered by plaintiff following her complaint do not rise to the level of what our cases have described as 'adverse employment action'"). Again, while Plaintiff has alleged a deteriorating work relationship with his colleagues as a result of the negative evaluations and recommendations for non-renewal of contract, these actions alone are not sufficiently adverse to alter terms, conditions or privileges of employment.

While some courts hold that "retaliatory harassment could, under certain circumstances, constitute an 'adverse employment action' which is actionable under the rubric of a First Amendment cause of action," these courts also hold the acts of harassment must "likely deter a person of ordinary firmness from the exercise of his or her First Amendment rights." *Zugarek v. S. Tioga Sch. Dist.*, 214 F. Supp. 2d 468, 476 (M.D. Pa. 2002) (discussing applicable case law). Evaluations that contain "false perceptions" from in-class observations, "derogatory written comments," and "conclusions of teaching effectiveness without first discussing their classroom observations with [Plaintiff],"[3] (Am. Compl. ¶ 21(a)), in addition to some unkind words from colleagues do not rise to the level of an adverse employment action that would deter a person of ordinary firmness from exercising his or her First Amendment right. *Id.* As this Circuit has noted, "'[n]ot everything that makes an employee unhappy' qualifies as retaliation, for 'otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a . . . suit.'" *Robinson*, 120 F.3d at 1301 (internal quotations omitted). Therefore, Plaintiff has failed to state a claim for retaliation under the First and Fourteenth Amendment.

C. Count Five: Plaintiff's Remaining State Law Claim

Plaintiff asserts a state law claim of breach of contract. A federal district court's decision to exercise supplemental jurisdiction over state law claims is a matter of discretion and the exercise of jurisdiction should be avoided whenever possible "as a matter of comity and to promote justice

[3] When examining the Amended Complaint and the exhibits attached thereto, it is unclear whether the comments made about Plaintiff during his evaluation process were negative or whether they were merely constructive criticism.

between parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also* 28 U.S.C. § 1367(c) (granting district court authority to decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction"). In deciding to dismiss state law claims, a district court must take into consideration principles of judicial economy, convenience, fairness, and comity. *Rosado v. Wyman*, 397 U.S. 397, 403-5 (1970). Bearing such principles in mind, and in light of the dismissal of Plaintiff's federal claims, Plaintiff's breach of contract claim is more appropriately resolved in state court. Thus, I dismiss the breach of contract claim without prejudice to Plaintiff's filing it in the appropriate state court.[4]

IV. CONCLUSION

The Amended Complaint does not state a claim upon which relief could be granted under RICO or § 1983. As such, Defendants' motion to dismiss with respect to those claims is granted. Any state law claims contained in Plaintiff's complaint are dismissed without prejudice, and, pursuant to 28 U.S.C. § 1367(d), Plaintiff has thirty days to file any surviving claims in state court. An appropriate Order follows.

[4] To the extent that a claim for defamation could be read liberally from Plaintiff's Amended Complaint, this claim also would be more appropriately decided in state court in light of the dismissal of Plaintiff's federal claims.

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ORDER

AND NOW, this **25th** day of **November, 2003**, upon consideration of Defendants' motion to dismiss, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' Motion to Dismiss (Document No. 16) is **GRANTED** as follows:

   a. Plaintiff's claims with respect to 18 U.S.C. § 1964(c), 18 U.S.C. § 1964(d), and 42 U.S.C. § 1983(c) are **DISMISSED**.

   b. Any remaining state law claims are **DISMISSED WITHOUT PREJUDICE**. Pursuant to 28 U.S.C. § 1367(d), Plaintiff has thirty (30) days from the date of this order to file any surviving state law claims in the appropriate state court.

2. The Clerk of the Court is directed to close this case for statistical purposes.

BY THE COURT:

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Berle M. Schiller, J.