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

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| KEITH A. HILL, | : | CIVIL ACTION |
| Plaintiff, | : | |
| v. | : | No. 04-3390 |
| BOROUGH OF KUTZTOWN and GENNARO MARINO, MAYOR OF KUTZTOWN, in his individual and official capacity, | : | |
| Defendants. | : | |

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.** **JANUARY 12, 2005**

## I. INTRODUCTION

Presently before this Court are two Motions. Each of the Defendants have filed separate Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, both Motions will be granted.

## II. BACKGROUND

On July 19, 2004, the Plaintiff, Keith A. Hill ("Hill"), filed a seven-count Complaint against Defendants, the Borough of Kutztown ("Kutztown") and Mayor Gennaro Marino ("Marino"). Plaintiff brings the following three Section 1983 claims against Kutztown and Marino: a discrimination and due process claim (Count I), a claim for retaliation (Count II), and a claim for the destruction of his reputation (Count III). Hill has also brought the following claims against Kutztown: an Age Discrimination in Employment Act of 1967 ("ADEA") claim, 29 U.S.C. § 621 *et seq.* (Count IV), a Pennsylvania Human Relations Act ("PHRA") claim, 43

PA. CONS. STAT. ANN. § 951 *et. seq.* (Count V) and a state law claim for indemnification and restitution (Count VI). Additionally, Hill has brought a state law malicious prosecution claim against Marino (Count VII).

According to Hill's Complaint, for almost twelve years, he served as the Borough Manager of Kutztown. In early 2002, Marino had just been elected Mayor of Kutztown. According to Hill, after Marino was elected Mayor, he "purposely undertook . . . to engage in . . . conduct to intimidate, oppress and harass Plaintiff in order to drive him from public employment, destroy his reputation, and destroy his ability to pursue a livelihood, his licensed profession and his chosen career as a public servant." (Compl. ¶ 38). Hill also alleges that he submitted complaints about Marino to the Borough Council. Also, in his capacity as the Borough Manager, Hill was intimately involved in a telecommunications project, which consisted of a Borough owned fiber-optic network. Hill alleges that "Marino engaged in conduct to intimidate, oppress and harass Plaintiff substantially out of malice and in retaliation against Plaintiff for forwarding his and others' complaints against the Defendant Marino and for expressing support for the telecommunications project." (Id. ¶ 43). Hill alleges that Marino intimidated and confronted him at his workplace and at Borough Council meetings and falsely and maliciously defamed him, including publishing newspaper commentaries about Hill in his capacity as Borough Manager. For example, Hill attaches to his Complaint an August 22, 2003 newspaper editorial written by Marino, in which Marino states that "[t]he Borough Manager, with approval of the council, is recklessly handling our money."[1] (Id. at Ex. D).

[1] While the instant Motions before this Court are Motions to Dismiss pursuant to Rule 12(b)(6), certain documents, such as exhibits attached to the Complaint and upon which one or more claims is based can be considered in deciding a Rule 12(b)(6) motion. See Rossman v.

Ultimately, Hill alleges that:

> Defendant Marino's unbridled course, plan and pattern of conduct overall substantially rendered Plaintiff's continued employment for the Borough of Kutztown so intolerable (without any redress by Council) that it constituted a constructive discharge from employment, making resignation not only a fitting response to the conditions, but the only available response Plaintiff had to the controlling and relentless policy of abusive behavior toward him pursued by Defendant Marino under color of state law.

(Id. ¶ 55). Hill sent his letter of resignation to the Borough Council on August 29, 2002 stating that he would resign on October 12, 2002. Hill's Complaint states that Marino,

> acting as an official of the Borough of Kutztown in his individual and official capacity under color of state law and as policy-maker for the Borough in regard to injuring and driving Plaintiff from his employment - brought about the constructive discharge of Plaintiff through a course, plan and pattern of hostile, oppressive, intimidating and harassing conduct to destroy his good reputation and his right to earn a living and pursue his licensed profession and public service career.

(Id. ¶ 58). In his Complaint, Hill states the Borough Council attempted to retain him as Kutztown's Borough Manager even after he submitted his letter of resignation in August of 2002. Hill states that he did not "acquiesce in the [Borough] Council's request that he forego his resignation altogether, because [the Borough] Council did not at any time halt, reverse or lessen the harassment, intimidation and oppression by the Mayor which had created the intolerable working circumstances as aforesaid." (Id. ¶ 67).

Hill asserts that:

> Marino, as the elected official and agent of the Borough of Kutztown and as an actual and/or *de facto* policy-maker in respect to the matters here in issue, has pursued and continues maliciously

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Fleet Bank (R.I.) Nat. Ass'n, 280 F.3d 384, 388 n.4 (3d Cir. 2002).

> and arbitrarily to pursue his course, plan and pattern of intimidating, harassing and oppressive conduct to violate Plaintiff's federal constitutional rights of due process, equal protection, free expression and association, as well as his constitutionally protected liberty and property interests.

(Id. ¶ 97). As to the Borough's Section 1983 liability, Hill asserts that "[d]espite full knowledge thereof, no other official or agency of the Borough of Kutztown or its elected government halted, reversed, lessened or materially affected the offending conduct and policy implemented by Defendant Marino, which policy therefore served as the policy of the Borough." (Id. ¶ 102). The purported Kutztown policy alleged in the Complaint, therefore, is the failure of the Borough Council to halt the actions of the independently elected Mayor of the Borough, Marino.

After Hill left his employment with the Borough, he states that an arrangement was created between himself and the Borough Council whereby Hill would be "on call to the Borough Council to provide emergency transitional services for the Borough until a replacement Manager was hired and was in a position to act." (Id. ¶ 71). This "transitional arrangement" between Hill and the Borough Council lasted from October 2002 until January 2003. Hill asserts that in January 2003, he became aware of two complaints that were filed against him to two state agencies purportedly by Marino, in connection with Hill's transitional service to the Borough. According to Hill, he was vindicated on both of these matters, but states that defending such matters resulted in Hill suffering substantial distress and personal expense and form the basis for his malicious prosecution claim against Marino.

## III. STANDARD

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court

must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

## IV. DISCUSSION

Both Defendants have filed separate Motions to Dismiss. As the analysis for each Motion differs in some respects, this Court will separately consider each Motion.

### A. BOROUGH'S MOTION TO DISMISS

As previously stated, Hill has alleged six claims against the Kutztown. Three of Hill's claims are being brought against Kutztown under Section 1983. Two of the claims arise from the purported age discrimination Hill suffered. The final claim against the Borough seeks indemnification and restitution for the costs and expenses Hill suffered as a result of defending the state agency matters. For the following reasons, all of these claims must be dismissed.

#### 1. Hill's Section 1983 claims against Kutztown (Counts I, II and III)

Hill brings three Section 1983 claims against the Borough. In all three claims, Hill states that Marino acted as the actual and/or de facto policy maker of Kutztown. Also, all three claims premise liability on the basis that Kutztown failed to lessen or halt Marino's treatment of him. Thus, in Count I, Hill asserts that Kutztown has violated his substantive and procedural due process rights as well as violated his rights to equal protection under the law. Hill alleges that Marino's conduct caused him to be constructively discharged. In Count II, Hill

alleges that Marino retaliated against Hill's exercise of his right to free expression and association because (1) Hill reported to the Borough Council his complaints about Marino's conduct toward himself and others in public service; (2) Hill advocated ideas and principles at odds with Marino including the continuation of the telecommunications project; and (3) Hill supported the policies and programs of the previous Mayor. (Compl. ¶ 110). Finally, in Count III, Hill asserts that Marino engaged in a campaign to harass and intimidate Hill with the purpose of terminating Hill's public employment.

When a plaintiff alleges a Section 1983 claim, "a plaintiff is required to show that: '(1) the conduct complained of must be committed by a person acting under color of state law; and (2) the conduct deprived plaintiff of a right or privilege guaranteed by the Constitution or the laws of the United States.'" Simril v. Township of Warwick, No. 00-5668, 2001 WL 910947, at *2 (E.D. Pa. Aug. 10, 2001)(quoting Robb v. City of Phila., 733 F.2d 286, 290 (3d Cir. 1984)). Regarding a Section 1983 claim against a municipality, the United States Supreme Court ("Supreme Court") has stated that "a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 691 (1978). Similarly, the Supreme Court stated in Monell that:

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity it responsible under § 1983.

Id. at 694. Thus, "a plaintiff who has a viable Section 1983 cause of action against a

municipality is required to allege that he has suffered an injury as a result of the implementation of a policy or custom of the municipality." Simril, 2001 WL 910947, at *2 (citing Monell, 436 U.S. at 694). A municipal policy or custom can be alleged in various ways for purposes of establishing municipal liability under Section 1983, including:

> the formal enactment or adoption of ordinances, regulations and various governmental edicts will be sufficient to constitute municipal policy, however "[a] plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" Praprotnik v. City of St. Louis, 485 U.S. 112, 127 (1988)(citation omitted). Municipalities also can be found liable through attribution to them of the conduct of certain high ranking officials who have final policy making authority. Id. at 123; Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986). Additionally, municipalities can be held liable under § 1983 for their failure to supervise or train their employees. City of Canton v. Harris, 489 U.S. 378 (1989).

Hanenberg v. Borough of Bath, No. 94-1929, 1994 WL 646112, at *4 (E.D. Pa. Nov. 16, 1994).

Hill attempts to establish municipal liability by asserting that Marino acted "as a policy maker for the Borough." (Compl. ¶ 95). The purported municipal policy relied upon by Hill in his Complaint is the following:

> [a]lthough Defendant Marino's wrongful acts, course, plan and pattern were known to the Borough Council and to each of its members, the Council did not halt, reverse or lessen or otherwise materially affect the alleged offending conduct of the Mayor, thereby leaving his continuing course of action against Plaintiff Hill to serve and operate as the controlling, actual and *de facto* policy of the Borough.

(Id. ¶ 16).

As this Court has stated, "[m]unicipalities can be found liable for violations of

Section 1983 through the conduct of certain high ranking officials who have final policymaking authority." Simril, 2001 WL 910947, at *4 (citing Praprotnik, 485 U.S. at 123); see also, Pembaur, 475 U.S. at 481 (stating "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered"). "The identification of officials who possess final policymaking authority with regard to a given act is an issue of state, or local, law." Id. (citing Praprotnik, 485 U.S. at 123). As the Supreme Court has noted, "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." Jett v. Dallas Ind. School Dist., 491 U.S. 701, 737 (1989). Additionally, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." Praprotnik, 485 U.S. at 123 (citation omitted).

The Borough Council, not the independently elected mayor, has control over the Borough Manager's employment. Specifically:

> [t]he council of any Borough may, at its discretion, at any time, create by ordinance the office of borough manager and may in like manner abolish the same. While said office exists, the council shall, from time to time, and whenever there is a vacancy, elect, by a vote of a majority of all the members, one person to fill said office, subject to removal by the council at any time by a vote of the majority of all the members.

53 PA. CON. STAT. ANN. § 46141. Pennsylvania law indicates that "[t]he power and duties of the borough manager shall be regulated by ordinance." Id. at § 46142. Thus, the Borough Council,

not the Mayor, has final policy making authority over the Borough Manager's employment.[2]

In his Complaint, the purported Borough policy is its failure to lessen or prevent the elected mayor, Marino, from making statements about Hill that brought about his constructive discharge. However, the Borough Code clearly states that it is the Borough Council, not the Mayor, which is the policy maker regarding the "action" at issue here, namely the Borough Manager's employment. As the Complaint illustrates, the Borough Council was completely satisfied with Hill's employment as evidenced by their plea with him to remain the Kutztown's Borough Manager and by their distaste for Marino's comments and actions as alleged in the Complaint.[3] As such, Hill has failed to allege conduct of a policy maker that is properly attributable to the municipality. Rather, Hill's claims against Kutztown are based on a respondeat superior theory that cannot be asserted against a municipality under Section 1983 and Monell.

In support of his Section 1983 claims against Kutztown, Hill cites to

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[2] As the Code to the Borough of Kutztown ("Borough Code") states:

> [t]he Borough Manager . . . shall be appointed for an indefinite term by a majority of all members of the Council. The Manager shall serve at the pleasure of the Council, and he may be removed at any time by a majority vote of all the members of the Council. At least thirty (30) days before such removal is to become effective, the Council shall furnish the Manager with a written statement setting forth its intention to remove him.

(Rep. Br. of Kutztown Supp. Mot. Dismiss, Ex. A); see also, Borough of Kutztown Code § 29-7.

[3] Even before Hill submitted his letter of resignation, the Borough Council President had made statements to the effect that Mr. Marino's comments were "smearing the reputations of good people." (Id. Ex. A).

Bartholomew v. Fischel, 782 F.2d 1148 (3d Cir. 1986). In Bartholomew, the plaintiff was appointed Acting Executive Director of the BiCity Health Bureau ("BCHB") created by the cities of Allentown and Bethlehem. Id. at 1149. The Chairman of the Board of Health and Bartholomew then began to seek Bartholomew's appointment as permanent Executive Director. Id. at 1150. The Mayor of Allentown, Fishel, opposed this appointment because of Bartholomew's stance favoring fluoridation of Allentown's drinking water. Id. As stated by the United States Court of Appeals for the Third Circuit ("Third Circuit"):

> Mayor Fischl's opposition to Bartholomew's appointment was so strong, appellant claims, that the mayor refused to recognize Bartholomew as Director of the BCHB, ordered his pay withheld, and had a police officer stationed outside appellant's office to bar his entry. When Bartholomew received some of his salary from the Board of Health, Fischl is alleged to have publicly accused Bartholomew of theft and sought to have him indicted and arrested. Fischl ultimately persuaded the Allentown and Bethlehem city councils to dissolve the BCHB, [Bartholomew] asserts, thereby eliminating Bartholomew's position altogether.

Id. As the Third Circuit noted, "Mayor Fischl was powerless to discharge Bartholomew himself," thus, the only way to terminate Bartholomew was to persuade the city council to dissolve the BCHB altogether, thereby eliminating Bartholomew's position, which Fischl ultimately accomplished. Id. at 1153. The Third Circuit noted that "it is this course of conduct that Bartholomew refers to when he charges that Fischl obtained his dismissal and his complaint contained sufficient facts to so notify defendants." Id. (internal quotation marks omitted). Thus, the Third Circuit found that Bartholomew had sufficiently stated "the factual basis for his claim that his constitutional deprivation was caused by the official policy of the City of Allentown." Id.

Unlike Bartholomew, Marino did not persuade the Borough Council, the only entity with the authority to terminate the Borough Manager, to terminate Hill. Indeed, the Borough Council remained in complete support of Hill and in no way attempted to force him from his position as Borough Manager. Thus, Hill's reliance on Bartholomew is misplaced because Marino had no authority to terminate Hill and the Borough Council never terminated Hill. See Carver v. Foerster, 102 F.3d 96, 101 (3d Cir. 1996)(interpreting Bartholomew and stating that "the mayor's persuasion of the city council constituted 'official city policy' and was sufficient to sustain a claim against the city under Section 1983.") Since the Borough Council did not terminate Hill, and it was the only entity with policy making authority as to the Borough Manager's employment, Hill has failed to allege a municipal policy that could give rise to municipal liability under Section 1983. Thus, Counts I, II and III against Kutztown are dismissed.

**2. Hill's Age Discrimination Claims (Counts IV and V)**

As previously stated, Hill has brought both an ADEA and a PHRA claim against Kutztown. Kutztown asserts that these two claims should be dismissed because Hill cannot establish his *prima facie* case, most notably his claim of constructive discharge against Kutztown. As with Hill's Section 1983 claims against Kutztown, he again alleges that Kutztown should be liable because it failed to halt, reverse or lessen the offending conduct of the independently elected Mayor, Marino, thereby making it Kutztown policy to discriminate against Hill because of his age.

Under the ADEA, "[i]n order to establish a *prima facie* case of age discrimination, a plaintiff must demonstrate by a preponderance of the evidence that he or she: (1) is at least 40

years of age; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by a sufficiently younger person to permit an inference of age discrimination." Strang v. Ridley School Dist., No. 03-4625, 2004 WL 2331900, at *5 (E.D. Pa. Oct. 12, 2004)(citing Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 136 (3d Cir. 1997)). In this case, Kutztown argues that Hill has failed to allege an adverse employment action. Hill's constructive discharge claim relies upon the comments of the independently elected Mayor, Marino. However, as stated in the previous section, it is the Borough Council, not the Mayor, that has complete control over the employment of the Borough Manager. Indeed, as stated in the Complaint, the Borough Council remained completely satisfied with Hill's performance as evidenced by their plea with Hill to remain the Borough Manager. Simply put, the Borough Council cannot control the words of the independently elected Mayor.

In support of his age discrimination claim, Hill cites to Suders v. Pennsylvania State Police, 124 S. Ct. 2342 (2004). In Suders, the United States Supreme Court ("Supreme Court") granted certiorari "to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as tangible employment action." 124 S. Ct. at 2350. In Suders, the plaintiff alleged sexually harassing conduct by her supervisors of such severity that she was forced to resign. Id. at 2346. In the context of a hostile environment claim in violation of the ADEA: "there are five elements to such a claim: (1) intentional discrimination because of age which is (2) pervasive and regular, (3) has detrimental effects that (4) would be suffered by a reasonable person of the same age in the same position, and (5) that respondeat superior liability exists." Fries v. Metro. Mgmt. Corp., 293 F. Supp. 2d 498, 504 (E.D. Pa. 2003)(citing Jackson v. R.I. Williams & Assocs., Inc., No. 98-1741,

1998 WL 316090 (E.D. Pa. June 8, 1998); Tumolo v. Triangle Pacific Corp., 46 F. Supp. 2d 410, 412 (E.D. Pa. 1999). In this case, however, as the Borough Code makes clear, the independently elected Mayor is not the supervisor of the Borough Manager, the Borough Council is. Reading Hill's Complaint liberally, Hill's purported age discrimination claim is that Marino subjected Hill to criticism because of his age, causing a work environment so severe that Hill had no choice but to resign. In his Complaint, Hill alleges that upon his election, Marino "began orally to spread the word that he intended to get rid of Plaintiff and some other high-priced senior staff employees." (Compl. ¶ 19). However, Marino was the independently elected Mayor. As such, the Borough Council cannot control what the elected Mayor says. Thus, Hill has failed to state an age discrimination claim under the ADEA based on his purported constructive discharge by Kutztown since the Borough Council had no authority to control statements made by Marino. Thus, Hill cannot allege that respondeat superior liability is present towards the Borough as to Marino's statements so as to preclude his hostile work environment claim based on age. Furthermore, this Court reiterates that the entity in charge of Hill's employment, the Borough Council, remained in complete support of Hill as alleged in the Complaint.

Regarding Hill's PHRA claim, as stated by one court, "[t]here is no language to differentiate the *prima facie* requirements of the ADEA from the PHRA, so the prior discussion applies equally to the PHRA as to the ADEA." Strang, 2004 WL 2331900, at *7 n.2. Thus, Hill's age discrimination claims under the ADEA and the PHRA against Kutztown are dismissed.

As all of the federal and constitutional claims against Kutztown have been dismissed, the pendant state law claims of indemnification and restitution (Count VI) against it

will also be dismissed. See DiGiovanni v. City of Philadelphia, 531 F. Supp. 141, 146 (E.D. Pa. 1982)(stating "[b]ecause I have already determined that the federal statutory and constitutional claims against the City must be dismissed, the pendant state law claims against it will also be dismissed"). Therefore, for all of the foregoing reasons, all of the claims against Kutztown are dismissed.

### B. MARINO'S MOTION TO DISMISS

Hill has alleged four claims against Marino. Hill asserts his claims against Marino in both his official and individual capacity. Specifically, Hill asserts the same three Section 1983 claims against Marino as he asserted against Kutztown. Once again, those claims are entitled as follows: (1) Discrimination and Due Process Claim under Section 1983 (Count I); (2) Claim for Campaign of Retaliation under Section 1983; and (3) Claim for Campaign to Destroy Reputation under Section 1983 (Count III). Additionally, Hill asserts a state law claim for malicious prosecution against Marino (Count VII). For the following reasons, all of these claims must be dismissed.

#### 1. Due Process Claims

In Count I, Hill asserts both a procedural and substantive due process claim against Marino as well as an equal protection claim.[4] This Court will examine each of these claims in turn.

As stated by the courts:

[a] plaintiff who brings a § 1983 suit based on a violation of the

[4] In Hill's Complaint, he attempts to bring both a property interest due process claim through Count I, and a liberty interest claim through Count III by entitling that Count "Claim for Campaign to Destroy Reputation under § 1983."

> due process clause must therefore allege and prove five things: (1) that he was deprived of a protected liberty or property interest; (2) that this deprivation was without due process; (3) that the defendant subjected the plaintiff or caused the plaintiff to be subjected to, this deprivation without due process; (4) that the defendant was acting under color of state law; and (5) that the plaintiff suffered injury as a result of the deprivation without due process.

Schwartz v. County of Montgomery, 843 F. Supp. 962 (E.D. Pa. 1994)(citing Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989)). In this case, Hill has failed to allege a protected property or liberty interest, thus, his due process claims must be dismissed.

*a. Property Interest*

While not specifically alleged in his Complaint, Hill's purported property interest is his property right in his job. "In order to succeed on a claim of deprivation of due process under the Fourteenth Amendment with respect to termination of a specific employment position, a plaintiff must first establish a property interest in employment." Latessa v. N.J. Racing Comm'n, 113 F.3d 1313, 1318 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972)). Additionally, "a property interest exists only when there is a legitimate claim of entitlement to the subject of the alleged deprivation." Connor v. Clinton County Prison, 963 F. Supp. 442, 446 (M.D. Pa. 1997)(citing Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 233 (M.D. Pa. 1995)); see also Sanguigni v. Pittsburgh Bd. of Public Educ., 968 F.2d 393, 401 (3d Cir. 1992)(citations omitted)("A property interest in state employment exists where an employee has a legitimate claim of entitlement to such employment under state law, policy or custom. An employee, however, must have more than an abstract type of unilateral expectation.").

As municipal employees in Pennsylvania are generally at-will employees, a

plaintiff must allege that he has "an enforceable expectation of continued employment or some form of guarantee of continued employment extended by the municipality/employer." Connor, 963 F. Supp. at 446 (citing Shoemaker, 906 F. Supp. at 233). The Third Circuit has noted that two types of contracts have been found to be protected property under the Fourteenth Amendment. See Sanguigni, 968 F.2d at 401. "The first is a contract that confers protected status, such as a tenure contract providing for permanent employment. The second is a contract explicitly providing that it may be terminated only for cause." Id. In his Complaint, Hill does not allege that he either had tenure or had a contract for employment providing that he could only be terminated by cause. Instead, Hill was an at-will employee under Pennsylvania law.

In Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 433 (E.D. Pa. 1998), the court examined a former Borough Manager's due process claim. In Satterfield, a Borough Manager brought several constitutional claims after he was terminated from his position by the Borough Council by a vote of six to one. Id. at 428. First, the court in Satterfield stated that Pennsylvania law prevented the plaintiff from having a legitimate claim of entitlement to his job as Borough Manager. Id. at 433. Specifically, the court noted that Pennsylvania law states that the Borough Manager is "subject to removal by the council at any time by a vote of the majority of members." Id. (citing 53 PA. CONS. STAT. ANN. § 46141). As the plaintiff failed to allege a claim of entitlement to his position of Borough Manager, the court would not allow his property right due process claim to move forward. Id. Thus, even though the Borough Council in Satterfield had actually terminated the Borough Manager from employment, the court would not allow his property right due process claim to move forward. Similarly, Hill has not alleged a claim of entitlement to his position as Borough Manager. Therefore, for the same reasons the

court dismissed Satterfield's property right due process claim, this Court will dismiss Hill's property right due process claim.

*b. Liberty Interest*

Hill's liberty interest claim is purportedly based upon the stigmatizing and false statements made by Marino about Hill that ultimately led to Hill's constructive discharge. In Satterfield, then District Judge Van Antwerpen examined a former Borough Manager's liberty interest claim. The court noted that

> [t]he Supreme Court has held that reputation alone is not an interest protected by the Due Process Clause. In addition, defamation . . . is only actionable under 42 U.S.C. § 1983 if it occurs in the course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution.

Satterfield, 12 F. Supp. 2d at 433-34 (citing Paul v. Davis, 424 U.S. 693, 701-12 (1976)). In that case, the plaintiff alleged "that he was deprived of a protected liberty interest because the Defendants distributed stigmatizing information regarding the reasons for his discharge." Id. at 433. In Satterfield, the court noted that while there was a definite change in the Borough Manager's employment status (he was terminated by the Borough Council), "this status was not protected by state law or the constitution. On the contrary, state law explicitly denies that any such right exists." 12 F. Supp. 2d at 434 (citing 53 PA. CONS. STAT. ANN. § 46141). The court continued by stating that the former Borough Manager "cannot establish that he had any protected interest whatsoever in retaining his job . . . . [t]herefore, the 'loss [of employment] could not constitute the alteration or extinction of any right or interest.'" Id. (citing Clark v. Township of Falls, 890 F.2d 611, 620 (3d Cir. 1989)). Thus, in Satterfield, the court held that the

former Borough Manager "had failed to show that he was denied a right or status guaranteed by state law or the constitution" and thus granted the defendants summary judgment motion as to his liberty interest claim. Id.

In this case, Hill's purported liberty interest claim arises from the stigmatizing statements made by Mayor Marino about Hill; statements which ultimately led to his constructive discharge from his position as Borough Manager. As explained in Satterfield and above, however, a Borough Manager cannot establish that he had any protected interest in retaining his job and thus the loss of his employment does not constitute the alteration or extinction of any right or interest. Therefore, for similar reasons as the court held in Satterfield, this Court will dismiss Hill's liberty interest claim since he has not alleged that he was denied a right guaranteed by state law or the constitution. Because Hill has failed to allege a property right or liberty interest that was violated in this case, this Court will dismiss Hill's property right due process claims against Marino as alleged in Count I and his reputation claim as set out in Count III.[5]

**2. Equal Protection**

In addition to asserting due process claims in Count I of his Complaint, Hill also asserts a claim for Equal Protection. While somewhat unclear from his Complaint, in his Response Brief, Hill states that he is pursuing his Equal Protection claim under a "class of one"

[5] Additionally, as the courts have noted in the context of defamation in the course of forced separation from public employment, "the allegedly stigmatizing information must have been published or disseminated by the employer to the public." Zezulewicz v. Port Auth. of Allegheny County, 290 F. Supp. 2d 583, 597 (W.D. Pa. 2003)(citing Chabal v. Reagan, 841 F.2d 1216, 1223 (3d Cir. 1988)). Here however, the purportedly stigmatizing information was espoused by the Mayor, an individual who was an independently elected Borough official, and not the "employer" of Hill under Pennsylvania law. See 53 PA. CONS. STAT. ANN. § 46141; Borough of Kutztown Code § 29-7.

theory as espoused in Village of Willowbrock v. Olech, 528 U.S. 562, 565 (2000). In Village of Willowbrook, the Supreme Court noted that equal protection claims can be brought by a "class of one," "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564. Reading the Complaint liberally, Hill bases his Equal Protection claim against Marino on the premise that Marino engaged in a campaign of defamation and ridicule against Hill eventually drove Hill to resign. Such an allegation of defamation on the part of Marino does not rise to the level of an equal protection violation, especially when coupled with the fact that Hill's employer, the Borough Council, readily supported Hill.

In support of his Equal Protection claim, Hill cites to Hoffman v. Thome, Nos. 02-5622, 01-5623, 2002 WL 31513440, at *8 (E.D. Pa. Nov. 4, 2002). This Court finds Hoffman distinguishable. In Hoffman, the court noted that the plaintiffs asserted that they were terminated from employment with the County because of the defendants' animosity towards them and plaintiffs' failure to give political support to the defendants. Id. The defendants in that case countered that one plaintiff was dismissed for his creation of a hostile work environment and that the employee's supervisor was dismissed because, as supervisor, he had failed to reprimand the purportedly hostile employee. Id. The court ultimately denied summary judgment concluding that the jury had to determine whether a rational basis existed for plaintiffs' termination. Id. In this case, however, the only allegation giving rise to Hill's Equal Protection claim is that the independently elected Mayor, who had no authority over Hill's employment, defamed Hill so as to drive him from employment even though Hill's employer (the Borough Council) continually supported him. Taking the allegations of the Complaint as true, such

defamatory conduct on the part of the Mayor, who has no authority over Hill's employment status, cannot state an Equal Protection violation, especially when coupled with the allegation in the Complaint that the Borough Council remained satisfied and content with Hill's performance as Borough Manager. Rather, as the courts have noted, a claim that a government official engaged in defamation does not necessarily implicate constitutionally protected rights but only gives rise to a tort action under state law. Otherwise, a constitutional case would arise every time a government employee engaged in tortious conduct while performing his duty.[6] See Smith v. Butler, 507 F. Supp. 952, 953 (E.D. Pa. 1981)(citing Paul, 424 U.S. at 698-99). Thus, this claim is dismissed.

**3. Retaliation**

Finally, in Count II of his Complaint, Hill alleges that Marino directed his conduct towards Hill in retaliation for his exercise of free expression and association guaranteed under

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[6] Under Pennsylvania law and the Borough Code, the Mayor's duties are:

> (1) to preserve order in the borough, to enforce the ordinance and regulations, to remove nuisances, to exact a faithful performance of the duties of the officers appointed, and to perform such other duties as shall be vested in his office by law or ordinance.
> (2) to sign such papers, contracts, obligations and documents as may be required by law.
> (3) to keep correct accounts of all fees, fines and costs received by him, to render to the council at least once a month an itemized statement of all such moneys so received since the last such statement, with the date at which and the purpose for which and the names of persons from whom the same was received, and to pay all such moneys into the borough treasury, except such costs and fees as he may be authorized to retain in lieu of salary; to report to the council from time to time on the state of the borough and to make recommendations to the council on matters of borough concern . . .

53 PA. CONS. STAT. ANN. § 46029.

the First Amendment. To state a First Amendment retaliation claim in a public employment case under Section 1983, Plaintiff must allege the following three elements: (1) that he engaged in protected activity; (2) that Marino responded with retaliation by constructively discharging Hill; and (3) that his protected activity was the cause of Defendants' retaliation. See Sokol v. Reading Reg'l Airport Auth., No. 99-111, 1999 WL 562757, at *2 (E.D. Pa. July 23, 1999)(citing Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997)). As previously stated, the purported protected activity on the part of Hill was (1) Hill's report to the Borough Council about Marino's oppressive and harassing behavior and intimidating conduct; (2) Hill's advocation and support of principles contrary to the those in which Marino favored, including the continuation of the telecommunications project; and (3) Hill's support of the policies and programs of the previous mayor.

As in previous sections, Plaintiff again relies upon Hoffman and Bartholomew to support this claim. In Hoffman, the plaintiffs brought a First Amendment retaliation claim. The plaintiffs asserted that they were terminated because they criticized a County decision to hire Staffmasters (an outside consultant hired by the County to run the IT department). See Hoffman, 2002 WL 31513440, at *3. As to the second element of establishing a retaliation claim, the Hoffman court noted "'[w]here a reasonable inference can be drawn that an employee's speech was at least one factor considered in deciding whether to take adverse action against an employee the court should leave the question of whether the speech was a motivating factor in that determination to the jury.'" Id. at *7 (quoting Sokol v. City of Reading, No. 99-111, 2000 U.S. Dist. LEXIS 8735, at *7-8 (E.D. Pa. May 25, 2000)). In Hill's case, unlike Hoffman, Hill's employer, the Borough Council, never discharged Hill either constructively or directly. Rather,

the allegation is that the Mayor, who had no authority over the employment status of the Borough Manager, constructively discharged Hill. For similar reasons, this Court finds that Plaintiff's reliance on Bartholomew is unavailing.[7] As previously explained, only the Borough Council has responsibility over the Borough Manager's employment. Thus, it is the Borough Council, as Hill's employer, who could retaliate against Hill, not the independently elected Mayor, Marino. As alleged in the Complaint, the Council continually supported Hill and even pleaded with him to stay in his position as Borough Manager. Hill could not be retaliated by the Mayor for Hill's statements because as a matter of Pennsylvania and local law, the Mayor had no authority over whatsoever over Hill's employment status. The Borough Manager is completely under the auspices of the Borough Council, not the Mayor's office. Therefore, Count II of Hill's Complaint against Marino is dismissed**.**

As all of the federal and constitutional claims against Marino have been dismissed, there is no need to engage in a discussion of Marino's immunity arguments.

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[7] As previously stated, Bartholomew involved a case where a public employee alleged he was terminated by the City Council, at the behest of the City Mayor, in part, because the plaintiff espoused pro-fluoridation views towards the city's water supply. 782 F.2d at 1152-53. The Third Circuit noted that the City Mayor could not discharge the plaintiff, but instead needed to and eventually persuaded the City Council to terminate plaintiff's position. Id. at 1153. The Court noted that:

> if Bartholomew is able to show at trial that an official policy opposing fluoridation existed, and that an official interpretation of that policy caused retaliation against and termination of Bartholomew for openly favoring fluoridation, such a policy would suffice as a basis for imposing liability upon the City of Allentown.

Id. Unlike Bartholomew, however, Hill never alleges that Marino's statements effectuated an adverse employment action taken by the one entity that could effectuate such a retaliation, the Borough Council.

Additionally, since thee federal claims against Marino have been dismissed, Hill's pendant state law claim of malicious prosecution against Hill will also be dismissed.

## V. CONCLUSION

This Court has found that Hill has failed to allege a policy or custom so as to state a Section 1983 Monell claim against Kutztown. Since Hill brought Counts I, II and III against Kutztown under Section 1983, all of these claims against the Borough are dismissed. Additionally, this Court has found that Hill has failed to allege a property right or liberty interest claim against Marino as well as failed to allege an equal protection and retaliation claim against him. Thus, since all of the federal claims are dismissed, this Court will dismiss Hill's pendant state law claims against Kutztown and Marino.

An appropriate Order follows.

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

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|---|---|---|
| KEITH A. HILL, | : | CIVIL ACTION |
| Plaintiff, | : | |
| v. | : | No. 04-3390 |
| BOROUGH OF KUTZTOWN and GENNARO MARINO, MAYOR OF KUTZTOWN, in his individual and official capacity | : | |
| Defendants. | : | |

**ORDER**

**AND NOW**, this 12th day of January, 2005, upon consideration of Defendants' Motion to Dismiss (Docs. No. 9, 10 and 14),[8] the Responses and Replies thereto, it is hereby **ORDERED** that both Motions are **GRANTED** and Plaintiff's Complaint is **DISMISSED**.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly, Sr. J.

[8] Document No. 9 is Marino's co-counsel's Motion to Dismiss. It simply states that it adopts the Motion to Dismiss as set out by Marino's other counsel in Document No. 10.