IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREDERIC M. STINER, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-312-SLR
	)	
THE UNIVERSITY OF DELAWARE,	)	
KENT ST. PIERRE, THE AMERICAN	)	
ASSOCIATION OF UNIVERSITY	)	
PROFESSORS and	)	
GERALD M. TURKEL,	)	
	)	
Defendants.	)	

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MEMORANDUM OPINION

Dated: August 27, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On April 29, 2002, plaintiff Frederic M. Stiner, Jr. filed this action against defendants the University of Delaware (the "University"), Kent St. Pierre ("St. Pierre"), The American Association of University Professors ("AAUP"), Gerald M. Turkel ("Turkel") and David L. Colton ("Colton"), claiming: (1) violations by the University and St. Pierre of plaintiff's First Amendment rights under 42 U.S.C. § 1983; (2) retaliation against plaintiff by the University; (3) violations of the Due Process Clause of the Fourteenth Amendment by the University and St. Pierre under 42 U.S.C. § 1983; (4) breach of fiduciary relations by AAUP, Turkel and Colton; (5) self-dealing by AAUP, Turkel and Colton; (6) breach of contract by all defendants; and (7) defamation by the University and St. Pierre. (D.I. 1)

On January 16, 2003, the court granted in part the University's and St. Pierre's joint motion to dismiss. (D.I. 19) In that memorandum opinion, the court dismissed plaintiff's First Amendment retaliation claims and breach of contract claim. Plaintiff subsequently filed an amended complaint alleging a violation of the Federal Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Presently before the court are defendants' motions for summary judgment as to all of plaintiff's remaining claims.

(D.I. 70; D.I. 77) For the reasons stated, the court will grant defendants' motions.

II. BACKGROUND

A. Plaintiff's Employment History

Plaintiff joined the faculty of the University in September 1982 as an associate professor of accounting. (D.I. 79 at 241-43) In 1984, plaintiff received tenure. (Id.) Throughout his employment with the University, plaintiff did not qualify for and did not seek a promotion to the position of full professor. (Id. at 240-41) On May 15, 2001, plaintiff retired from the University, effective December 31, 2001. (Id. at 118) Following the completion of the spring 2001 semester, plaintiff did not teach any additional courses at the University.

While on faculty at the University, plaintiff belonged to the AAUP, the union representing faculty members at the University. Between the years 1988 and 1990, plaintiff served as treasurer of the AAUP and later as a department representative to the AAUP. During the final two years of plaintiff's employment, his employment was governed by a collective bargaining agreement, which covered the period of July 1, 1999 through June 30, 2002 ("CBA"). (D.I. 79 at 38-55)

After leaving the University, plaintiff held consulting jobs while he searched for other teaching positions. (Id. at 253-54) In March 2002, plaintiff accepted a position as a full professor

and department chairman at Long Island University. (Id. at 137, 255-56) His present salary is higher than the salary he received at the University and he anticipates receiving formal tenure. (Id. at 134, 255)

B. Department Evaluation of Faculty Members

During the relevant time period, St. Pierre served as chairman of the accounting department at the University. As chairman, St. Pierre was responsible for scheduling workloads, assigning faculty to teach courses, addressing student concerns, evaluating department faculty, interacting with outside recruiters, department fundraising and coordinating with University administrators. (Id. at 188-92)

When St. Pierre arrived at the University in September 1993, the department had a written faculty evaluation procedure. (Id. at 1-6, 180-81) This document, the Promotion and Tenure Procedures & Criteria ("P & T document"), outlined three areas for faculty evaluation: teaching, scholarship and service. (Id. at 1-6) The principal purpose of the document was to guide promotion and tenure decisions. The use of the P & T document was consistent with the CBA's requirement which states that "[i]n the absence of [] written criteria, the chair/dean shall use the department's criteria for promotion and tenure." (D.I. 79 at 50)

C. Grievance Procedure

The CBA establishes a procedure for AAUP members to assert grievances related to the "interpretation, application or claimed violation of any provision" of the CBA. (Id. at 44) That grievance procedure has four steps. First, a grievant must initiate action by filing a written grievance to the grievant's department chairperson ("Step 1 grievance"). (Id.) The written grievance must be filed within twenty-five days of the event giving rise to the grievance. Following receipt of the Step 1 grievance, a meeting must be held between the department chairperson and the grievant during which the issues may be addressed and a remedy, if possible, determined. In the event the grievant is not satisfied with the outcome of Step 1, he may file a written appeal to the dean or director ("Step 2 grievance"). (Id.) At Step 2, the dean or director must meet with the grievant in an effort to resolve the asserted grievance. If, following that meeting, the grievant remains unsatisfied with the resolution of his grievance, his recourse is to seek a formal grievance hearing ("Step 3 grievance"). (Id.) The Step 3 grievance appeal is conducted before a panel consisting of the vice president and two faculty members selected in a manner detailed in the grievance procedure. (Id.) Under the CBA in force at the relevant time period, a grievant could not pursue a Step 3 grievance without the concurrence of the AAUP. (Id.)

Lastly, if the grievant is not satisfied with the outcome of the Step 3 grievance, and the AAUP concurs, the grievant may appeal for a hearing before a neutral arbitration panel selected in a manner detailed in the grievance procedure ("Step 4 grievance"). (Id. at 45)

D. Plaintiff's 1997 Grievance

In the summer of 1997, plaintiff filed his first grievance relating to an annual evaluation. (Id. at 11-14) On that evaluation, he received a "below criteria" evaluation with respect to the teaching category but "at criteria" in his overall evaluation. The thrust of plaintiff's grievance, besides being malcontent with the actual evaluation, was that St. Pierre failed to meet with plaintiff prior to finalizing the evaluation. After St. Pierre met with plaintiff, the matter was resolved without further progression in the grievance procedure. (Id. at 247, 252)

E. Plaintiff's 1998 Grievance

In 1998, plaintiff again received a "below criteria" evaluation with respect to teaching, but an "at criteria" evaluation overall. (Id. at 15-20) St. Pierre based the teaching evaluation on plaintiff's student-teacher evaluations. (Id. at 15-20, 224-25) Plaintiff filed a Step 1 grievance on the basis that neither the evaluation criteria nor the weight given each criterion had been shown to or explained to him. (Id. at

21) Plaintiff also complained that the student evaluations were not effective mechanisms for assessing the quality of teaching. (Id. at 21)

On June 1, 1998, St. Pierre denied plaintiff's Step 1 grievance. Plaintiff appealed that decision to the dean, who denied plaintiff's Step 2 grievance. On October 12, 1998, plaintiff filed a Step 3 grievance with the vice president for administration for the University. As this Step 3 grievance occurred under the previous CBA, concurrence from AAUP was not required. Plaintiff's grievance was resolved informally between him and the vice president prior to holding the Step 3 formal hearing.

In resolving the grievance, St. Pierre agreed to explain in writing his teaching evaluation methods which he did in a letter dated October 28, 1998. (Id. at 26) St. Pierre also agreed to permit plaintiff to address his concerns with the existing evaluation methods at an accounting department meeting. (Id. at 28-29)

On November 11, 1998, plaintiff addressed the department concerning the methods employed by St. Pierre. At that meeting, St. Pierre distributed the criteria he employed in evaluating faculty members. St. Pierre declined plaintiff's request to elaborate further on the method St. Pierre employed. The conversation then devolved into a group discussion of plaintiff's

student evaluations and his teaching ability.[1] As a result of what plaintiff believed to be an improper discussion of his performance evaluation, he filed a complaint with the Faculty Welfare and Privileges Committee. (D.I. 75 at 122) St. Pierre was asked to write a letter of apology to plaintiff. (Id. at 121)

E. Plaintiff's Retirement

In the following two academic years, 1998 and 1999, plaintiff received annual evaluations indicating that he was "at criteria." (D.I. 79 at 37-37, 56-65, 278-79) On March 29, 2001, plaintiff received his 2000 annual evaluation in which he received a "below criteria" review for both teaching and research. (D.I. 75 at 11; D.I. 79 at 260-61)

On May 15, 2001, plaintiff signed a statement announcing his intent to retire from the University. (Id. at 118) According to plaintiff, he did so because of the evaluations he received and the harassment he endured.[2] (D.I. 75 at 10)

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[1]According to plaintiff, other faculty members were responsible for turning the discussion to plaintiff's evaluation. (D.I. 75 at 18)

[2]Plaintiff characterizes this harassment as "public humiliation," "unfair teaching evaluations," assignment to teach lower-level courses, removal as chair of the Promotion and Tenure committee ("P & T committee"), and phone calls from St. Pierre in 1998 in which St. Pierre would curse and leave "snide" messages in his mailbox. (D.I. 75 at 10-10) The record does not reflect that plaintiff ever filed a grievance or other complaint with respect to his course assignments or the allegedly offensive calls from St. Pierre. Further, as plaintiff, by his option, did

Prior to announcing his retirement, plaintiff did not file a grievance regarding his 2000 annual evaluation and, under the CBA, any grievance would have to be filed within twenty-five days of aggrieved event. (D.I. 79 at 44) According to the University's vice president for administration, plaintiff initially indicated that his decision to retire was due to an illness in the family. (D.I. 79 at 148-49)

On June 17, 2001, in a letter to the University's vice president for labor relations, plaintiff for the first time stated that his retirement was actually the result of the harassment by St. Pierre. (Id. at 119-20) In that June 17, 2001 letter, plaintiff recounted his history with St. Pierre, asserting that this harassment stemmed from plaintiff's role as a whistle blower regarding an office lottery plan.[3] (Id.)

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not hold the position of Full Professor, he was not technically eligible to be chairman of the P & T committee. (D.I. 79 at 1) It is not clear how he was originally elected chairman of that committee if he was not eligible.

[3]This lottery, to which plaintiff has frequently referred, relates to a proposal by St. Pierre for selecting faculty offices in the accounting department's newly renovated building. Apparently, St. Pierre's plan involved auctioning off the offices to the highest bidder as a way to resolve who would obtain the most choice office spaces. The money that would be raised from this lottery would go into the accounting department's discretionary fund. Following plaintiff's alerting the administration to this plan, St. Pierre abandoned the lottery for a less capitalistic selection method.

F. Plaintiff's 2001 Grievance

After announcing his retirement, plaintiff was informed of his final merit related pay raise. Consistent with his 2000 evaluation, plaintiff received a low merit pay increase of 0.35%. On August 28, 2001, plaintiff filed a Step 1 grievance regarding the merit pay increase he received in connection with his 2000 evaluation. (Id. at 122-23) In his August 28, 2001 grievance, plaintiff also repeated his claim that St. Pierre failed to disclose sufficiently the faculty evaluation criteria and his claims of harassment by St. Pierre. (Id.) He indicated, however, that his grievance related only to his pay increase. (Id. at 121)

At the same time, plaintiff sent a letter to the University's vice president of administration raising several issues relating to his pending retirement. In addition to the merit pay increase, plaintiff expressed his concern that St. Pierre and an associate dean would defame his character while he sought new employment, and requested that he be granted emeritus status with the University. (Id. at 121)

Because plaintiff's claims related to the department chairperson, he was directed to bypass Step 1 in the grievance procedure and meet directly with the dean. (Id. at 121, 146-47) On August 30, 2001, plaintiff and the dean met to discuss plaintiff's grievance and related concerns. These concerns were

later summarized by plaintiff in a September 3, 2001 letter to the dean. (D.I. 79 at 124)

The dean offered to raise plaintiff's merit pay from 0.35% to 1.00%. (Id.) The dean, however, would not agree to change plaintiff's 2000 performance evaluation.[4] Plaintiff refused the dean's offer of a salary adjustment and chose to pursue a Step 3 grievance. (Id. at 284-85)

Consistent with the terms of the CBA, to pursue a Step 3 grievance, plaintiff required the support of the AAUP. Following receipt of his grievance, the AAUP sent a letter to the University stating the following:

> At their September 28, 2001 meeting, members of the AAUP Executive Council considered [plaintiff's] request for a Step 3 Grievance. As you know from plaintiff's Step 1 Grievance Statement ... [he] is requesting that the criteria for annual evaluations in his department be fully stated and published in the department.
>
> The Executive Council would like to have this matter resolved by having [plaintiff's] request honored. Should this not come to pass after fourteen days after your receipt of this letter, the Executive Council will permit [plaintiff] to file a Step 3 Grievance.

(D.I. 79 at 128) Following receipt of the AAUP letter, the University requested that St. Pierre provide the criteria he employed in performing faculty evaluations. On October 16, 2001,

[4]The court notes that, at the time he filed his grievance in August 2001, plaintiff's time for challenging his 2000 performance evaluation under the CBA had passed by several months.

in a letter to the University's vice president for administration, St. Pierre provided an explanation for his evaluation methodology. (Id. at 129)

The AAUP considered this response and, on November 14, 2001, met with University representatives. Plaintiff was not present for the November 14, 2001 meeting. In a letter dated November 15, 2001, the University's vice president for administration summarized the outcome of that meeting. First, she stated that "we agreed that the individual issues raised by [plaintiff] concerning his merit evaluation for the 2001-2002 year were tangibly addressed by [the dean]." (Id. at 135) Second, she indicated that an understanding had been reached that the then existing faculty evaluation metrics for the accounting department were not "well-defined" and that the P & T document lacked a clear method for applying general standards to specific cases. (Id.) Third, she stated that the University and AAUP agreed that the dean would ask for a complete review of the current evaluation system prior to the next merit evaluation cycle in 2002. Finally, she indicated that the AAUP would be involved in the process of developing the criteria and informed of the final outcome. (Id. at 135-36) Consistent with the agreement between the AAUP and the University, a new evaluation system was implemented in 2002. (Id. at 139, 150, 157-58)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there

must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Section 1983 Claim

Plaintiff alleges, pursuant to 42 U.S.C. § 1983, that he was unlawfully deprived of a property interest in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiff claims that his retirement in May 2001 constitutes a constructive discharge. He then argues that he was denied due process because the grievance procedures were not followed.

A former public employee alleging a due process claim under § 1983 asserts a claim predicated upon a denial of procedural due process, not substantive due process. See Nocholas v. Pennsylvania State University, 227 F.3d 133, 143 (3d Cir. 2000) (holding that a college professor's tenure is not a property right subject to substantive due process protection). The Due Process Clause of the Fourteenth Amendment of the Constitution prohibits a state from depriving individuals of life, liberty or property without due process of law. U.S. Const. amend. XIV, §

1. The University is a state actor and, as a consequence, the Fourteenth Amendment is applicable to it. See, e.g., Braden v. University of Pittsburgh, 552 F.2d 948, 955-65 (3d Cir. 1977). A plaintiff bringing suit under § 1983 alleging a state actor deprived him of procedural due process must demonstrate the following: (1) the plaintiff has a life, liberty or property interest subject to Fourteenth Amendment protection; and (2) the procedures available did not provide plaintiff with due process of law. See Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

In the context of a discharged public employee, the procedural due process analysis begins with whether the plaintiff's employment constituted a protected property interest. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972). Absent such an interest, there is no basis for a deprivation claim under § 1983. Whether a discharged employee has such a property interest is a question of state law. Id. It is well-established, and defendants do not dispute, that a tenured professor has such a property interest in his continued employment. See Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551, 559 (1956).

The second question is whether there was an involuntary separation. See Leheny v. City of Pittsburgh, 183 F.3d 220, 227-28 (3d Cir. 1999). It is a general rule that a voluntary separation cannot serve as a basis for a due process claim and a

resignation is presumed to be voluntary. See Id. Courts, however, will permit a plaintiff to show that his resignation had been procured under such circumstances that cannot be fairly characterized as voluntary. See id. In such cases, a plaintiff either must show that the resignation resulted from duress or coercion, or that the resignation was procured through misrepresentation or deceit. See id. at 228. Where a separated employee alleges that his resignation was coerced, he must show that the resignation resulted from employment conditions which, under an objective standard, are so unpleasant or so difficult that a reasonable employee in plaintiff’s position would resign. See id. In the case at bar, there are no allegations of misrepresentations upon which plaintiff relied in retiring. Therefore, plaintiff’s claim can only rest upon a showing of a coerced retirement.

The sin qua nom of the constructive discharge theory, however, are violations of the law which precipitated the separation. See Sanchez v. Denver Public Schools, 164 F.3d 527, 534 (10th Cir. 1998) (quoting Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir.1986)) (“Constructive discharge occurs when ‘the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.’"). For example, where a plaintiff alleges constructive discharge in a

Title VII case, the conduct complained of relates to the protected classifications under the statute. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3d Cir. 2001)(holding that the employee was not constructively discharged as a result of age discrimination); Shafer v. Board of Public Educ., 903 F.2d 243, 249 (3d Cir. 1990) (remanding for factual determination as discriminatory maternity leave policy, which violated Title VII, resulted in a constructive discharge); Goss v. Exxon, 747 F.2d 885, 888 (3d Cir. 1984)(affirming district court's findings that discrimination in violation of Title VII resulted in employee's constructive discharge). In the case at bar, plaintiff cannot rely upon any special statutory protections, but instead must demonstrate that the conditions leading to his involuntary separation taken as a whole violate procedural norms of due process. Plaintiff's claim must fail in this regard.

First, in considering plaintiff's constructive discharge claim, the court's inquiry is limited to the conditions relating to the voluntariness of his discharge. Consequently, his August 2002 grievance concerning his final merit pay allocation is wholly irrelevant. Even if the University's handling of plaintiff's grievance in the fall of 2002 was flawed or biased, it is inapposite as to the voluntariness of plaintiff's retirement in the spring of 2002.

Second, plaintiff demonstrates no conduct which violated his

right to due process in the events leading up to his retirement. The only possible conduct which might form a basis for such a claim was his 2001 annual evaluation. Plaintiff has repeatedly argued that the methodology employed by St. Pierre in evaluating professors was inappropriate. On more than one occasion plaintiff unsuccessfully sought to challenge that methodology when he was not content with his own evaluation. If the University did not have any system in place to challenge these evaluations, then plaintiff's claim might lie. But where, as here, an adequate procedure existed for addressing the concerns, no violation of due process exists. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."). In the case at bar, there was a grievance procedure with which plaintiff was quite familiar and that he concedes is not constitutionally inadequate. (D.I. 82 at 26) Instead of filing a timely grievance with respect to his 2001 evaluation, plaintiff retired. Plaintiff may not claim a deprivation of due process where he failed to engage the available procedures. See Leheny, 2183 F.3d at 229.

Plaintiff points to other conduct by St. Pierre which he asserts were conditions leading to his retirement decision. The Due Process Clause of the Fourteenth Amendment, however, "is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. 341, 350 (1976). The conduct of which plaintiff complains includes scheduling plaintiff to teach lower-level courses, harassing phone calls, public humiliation and his removal from the chairmanship of the P & T committee. Even if this conduct amounted to actionable harassment under state law, it does not constitute a deprivation of due process.

Consequently, the court finds that plaintiff has failed to put forth evidence by which a reasonable trier of fact could conclude that he was denied due process of law.

B. LMRA Claim

Plaintiff's second claim is brought pursuant to § 301 of the LMRA, 29 U.S.C. § 195.[5] To establish a claim under the LMRA, plaintiff must show that the AAUP breached its duty of fair representation and that the University breached the CBA. See

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[5]Defendants the University and St. Pierre assert that the University is not subject to the LMRA on the basis of Eleventh Amendment immunity. (D.I. 78 at 26) It then concedes that it is a distinction without a difference as the Delaware Public Employment Relations Act ("PERA"), to which it is subject, nonetheless follows federal law. The court notes that defendants' argument is incredible as it was they who first asserted that the LMRA applied to bar plaintiff's state contract claims. (D.I. 6 at 10-11)

DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 163 (1983). Plaintiff has not shown evidence by which a reasonable jury could conclude that the AAUP breached its duty of fair representation.

The duty of fair representation is akin to that of a fiduciary with an obligation to represent its members "adequately as well as honestly and in good faith." Air Line Pilots Ass'n, Intern. v. O'Neill, 499 U.S. 65, 75 (1991). A union breaches its duty when its decision is discriminatory, arbitrary or in bad faith. See Vaca v. Sipes, 386 U.S. 171, 190 (1967). Under the CBA, a Step 3 grievance will only proceed if the "AAUP concurs." (D.I. 79 at 44) The crux of plaintiff's argument is that the AAUP breached its duty of fair representation because it concurred with plaintiff's Step 3 grievance, but failed to pursue the Step 3 grievance.

In support of his argument, plaintiff relies upon correspondence he received from Turkel relating to plaintiff's pursuit of a Step 3 grievance on October 4, 2001. (D.I. 71, ex. K) Plaintiff's position is that this correspondence expresses the AAUP's concurrence. In the October 4, 2001 email received by plaintiff, Turkel writes, "[t]he Executive Council decided to support your grievance, but to attempt one more time to get the issues you raised resolved before we go to Step 3." (D.I. 71, ex. K) To that end, the AAUP would contact the University

directly and, if the matter were not resolved within fourteen days, it would support a Step 3 grievance. (D.I. 79 at 128) In its letter to the University, the AAUP indicated that the issue to be resolved was the publication of criteria for faculty evaluations.[6] (Id.)

Following a November 14, 2001 meeting between the University and the AAUP, a resolution was reached with respect to the issue regarding criteria for faculty evaluations. (D.I. 71, ex. N) Consequently, plaintiff was informed that the AAUP and University jointly believed that the grievance raised by plaintiff was resolved by an agreement between the AAUP and the University.

Regardless of whether the October 4, 2001 email constitutes a statement of concurrence vesting plaintiff with the right to a Step 3 hearing, the AAUP's failure to pursue that remedy is not,

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[6]Notably, the AAUP did not express any concern with respect to plaintiff's final merit pay increase or his request for emeritus status. (Id.) Moreover, while the issues of plaintiff's final merit pay increase and emeritus status were apparent topics of conversation at his August 30, 2001 meeting with the college dean, they were not specifically raised as grievances in his August 28, 2001 grievance letter. (D.I. 79 at 121-22)

The November 15, 2001 letter from the University reinforces the conclusion that the AAUP's conditional support for plaintiff's Step 3 grievance related only to the broad concern about annual evaluation criteria and not to plaintiff's specific evaluation. (D.I. 71, ex. N) In that letter, the University stated that the University and AAUP agreed that the dean's meeting with plaintiff had "tangibly addressed" his individual grievances. (Id.)

without more, a breach of its duty of fair representation.[7] To show a breach of its duty of fair representation, plaintiff has the burden of proving that the AAUP's decision to not pursue the Step 3 hearing was arbitrary, discriminatory or in bad faith. See Vaca, 386 U.S. at 190; Hendricks v. Edgewater Steel Co., 898 F.2d 385, 388 (3d Cir. 1990). Plaintiff has not shown the presence of any impermissible discriminatory factors that influenced the AAUP's decision. Plaintiff has not shown any evidence by which a trier of fact could conclude that the AAUP's decision was in bad faith or for an improper motive. Finally, there is no evidentiary basis to support the conclusion that the AAUP's decision was arbitrary. To the contrary, the evidence shows that the AAUP believed that it had reached a resolution with the University which addressed what it perceived to be the thrust of plaintiff's grievance, the faculty evaluation criteria, or at least resolved the AAUP's basis for supporting plaintiff's Step 3 grievance. Consequently, plaintiff's claim under § 301 of the LMRA fails.

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[7]The court notes that if in fact the AAUP had concurred but nonetheless simply failed to pursue the Step 3 grievance, plaintiff was not without legal recourse. At that point, plaintiff's remedy would have been to seek an order in state court for specific performance. See City of Wilmington v. Wilmington Firefighters Local 1590, Intern. Ass'n of Firefighters, 385 A.2d 720, 724-25 (Del. 1978). See also Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564 (3d Cir. 1995).

C. Defamation Claim

Under Delaware law, the tort of defamation consists of five elements: (1) the defamatory character of the communication; (2) publication; (3) the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury. See Bickling v. Kent General Hospital, 872 F. Supp. 1299, 1307 (D. Del. 1994).

In the case at bar, plaintiff has put forth no evidence to support a claim of defamation. Plaintiff initially alleged that defendants stated that he was "academically unqualified." (D.I. 82 at 34) Plaintiff has not produced evidence that this statement was ever made.[8] It is axiomatic that a statement which has not been made cannot constitute defamation.

Plaintiff also asserts that St. Pierre declined to provide an employment reference to Marshall University citing "legal issues." (D.I. 82 at 34) Plaintiff asserts this alleged defamatory remark for the first time in his answering brief. As

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[8]Plaintiff concedes that to arrive at this "statement," it is necessary to compare defendants' previous application for re-accreditation with its subsequent application for accreditation. (D.I. 83 at 14) On the first application, plaintiff was listed on the roster of professors who were considered "academically qualified." (D.I. 79 at 67) On the second application, plaintiff was not included on the list of "academically qualified" professors. (Id. at 91) This reclassification was explained previously in the document responsive to the accreditation team's input. (Id. at 84) Plaintiff essentially argues that it was defamatory for him to not be listed as "academically qualified."

plaintiff did not allege this unrelated event as a basis for defamation in either his first complaint or his amended complaint, he cannot now rely upon it to survive summary judgment. Moreover, the fact that plaintiff received an employment offer despite St. Pierre’s statement belies plaintiff’s claim of injury by defamation. (D.I. 79 at 254)

As plaintiff has produced no evidence to support his claim of defamation, the court concludes that defendants are entitled to summary judgment.[9]

D. Self-Dealing Claim

In his amended complaint, plaintiff alleged that Turkel and the AAUP’s conduct with respect to the University constituted self-dealing. Plaintiff has conceded, however, that he has no evidence to support this claim and agreed to its dismissal. (D.I. 74 at 1) Consequently, defendants Turkel and AAUP are entitled to summary judgment as to that count.

V. CONCLUSION

For the reasons stated, the court will grant defendants’ motions for summary judgment. An order shall issue.

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[9]As the court has found that plaintiff’s defamation claim fails, it need not reach the merits of defendants qualified immunity defense.