IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DR. KATHLEEN CARTER, Plaintiff, v. DELAWARE STATE UNIVERSITY, DR. WILLIAM B. DELAUDER, PRESIDENT, DR. JOHNNY TOLLIVER, DEAN JACQUELYN W. GORUM, DR. ALETA HANNAH and DELAWARE STATE UNIVERSITY BOARD OF TRUSTEES, Defendants.	)	C.A. No. 99-642 GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

On September 28, 1999, Dr. Kathleen Carter filed a complaint alleging that her employer, Delaware State University ("DSU"), and the above named defendants improperly denied her application for tenure at the university. Carter's complaint asserts various causes of action. Count One alleges race and gender discrimination under Title VII, 42 U.S.C. § 2000(e), *et seq*. Counts II and III allege causes of action under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Count IV asserts claims under 42 U.S.C. §§ 1985 and 1986, as well as civil conspiracy. In Count V, Carter alleges that the defendants violated the Delaware Discrimination in Employment Act. Count VI asserts a violation of Fourteenth Amendment, based on a lack of due process in the tenure decision. Count VII alleges violations of the Delaware Constitution. Count VIII asserts breach of contract based on Carter's allegation that the defendants failed to adhere to the procedures in the collective bargaining

agreement ("CBA"). Count IX alleges intentional infliction of emotional distress against all defendants. Finally, Count X requests punitive damages against all defendants.

Presently before the court are two motions - Carter's motion for partial summary judgment on Count VIII and the defendants' motion for summary judgment on all claims. In her motion for partial summary judgment, Carter asserts that the CBA clearly states that only "documented" evidence may be considered in granting or denying tenure. Carter argues that the defendants violated the terms of the CBA by considering oral, hearsay evidence in making their tenure decision. The defendants argue that Carter's claim is barred by the Eleventh Amendment's prohibition of pendent state law claims, or alternatively, that the CBA permits the consideration of oral evidence.

In their motion for summary judgment, the defendants assert that the remaining claims should be dismissed for various reasons. First, they argue that Count I should be dismissed because there is no direct evidence of racial or gender animus on the part of the university. Moreover, the defendants assert that there were valid, non-discriminatory reasons for the denial of tenure, such as Carter's deficiencies on certain projects. Second, the defendants assert that the Eleventh Amendment limits the claims under sections 1981, 1983, 1985, and 1986 to prospective injunctive relief against the individual defendants. The defendants further argue that the § 1983 claims should be dismissed because state officers cannot be sued in their official capacity under § 1983. Moreover, the defendants assert that the civil conspiracy claims under § 1985 and § 1986 should be dismissed because there is no racially motivated conspiracy, and a conspiracy cannot exist where only one state agency is implicated.

The defendants also assert that Counts V and VII are legally invalid.[1] The defendants defend Count VI by noting that there was no due process violation because Carter was not guaranteed tenure, and the tenure process is inherently subjective. The defendants argue that the court should dismiss the intentional infliction of emotional distress claim in Count IX because pendent state law claims against state entities are barred by the Eleventh Amendment. Finally, the defendants argue there is no malice present that would justify the award of punitive damages.

Upon review of the briefs, the record, and the law, the court agrees with the defendants that certain of the claims should be dismissed. The court will, therefore, grant the defendants' motion for summary judgment for DSU on all claims. However, the court will only grant summary judgment for the individual defendants on Count I and Counts IV-X. Summary judgment is not appropriate for Counts II and III as to the individual defendants. Nevertheless, the court accepts the view of both parties that the § 1981 and § 1983 claims in Counts II and III must be limited to prospective injunctive relief.[2] Thus, after the grant of summary judgment, all that will remain are § 1981 and § 1983 claims against the individual defendants in their official capacities for prospective injunctive relief. The court will now explain the reasoning for its ruling.

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[1] In her answering brief, the Plaintiff concedes that the claims under Counts V and VII are invalid. (D.I. 107 at 33, 37.) Thus, summary judgment for the defendants is appropriate on these claims. The court will not, therefore, discuss these claims.

[2] The plaintiff concedes that the claims under § 1981 and § 1983 are not viable against DSU and must be limited to prospective injunctive relief against the individual defendants. (D.I. 107 at 33.)

II. FACTS

In 1993, Dr. Kathleen Carter was hired as an Associate Professor of Education at DSU. DSU is a land grant college. It is, therefore, a public university operated by the State of Delaware. DSU is also a Historically Black College or University ("HBCU"). Thus, the majority of the administrators, faculty, and students at DSU are African American. Carter is white.

In 1995, Carter was appointed as chair of the DSU Education Department. According to Carter, several of her African American colleagues did not appreciate the fact that she, a white woman, was appointed to that position. Carter claims that she was told she was "usurping black persons' rights to govern themselves," and that she was "trying to make the black people [in the department] look bad." (D.I. 107 at 4.) Carter also alleges that Dr. Aleta Hannah accused her of polarizing the department along racial lines. Hannah alleges that during one department meeting, Carter told all of the professors - African American and white - that they should put everything in writing. Although Carter denies she made the statement, all parties agree that Hannah felt there was a racial overtone to the statement.

In September of 1995, Carter evaluated Hannah and the other professors in her department. Using a 1 to 5 scale, Carter gave Hannah a score of 3. Carter alleges that Hannah felt there was a racial bias involved in the evaluation.

At some point after the meeting and the evaluation, the six African American faculty members met and decided that Dr. Hannah should be chair. Dr. Hannah prepared an anonymous memo - "Concerns about the Chair." The memo listed several concerns about Carter's leadership. Carter's race is not mentioned in the memo. However, the memo does note the faculty's belief that Carter "fostere[d] dissension within the department, something along the lines of race." Soon after,

Carter met with the dean of her school, Dr. Jacquelyne Gorum, who told Carter that she did not believe she was racist. The department then had a meeting to remove Carter as chair. Although Carter won the "no-confidence" vote, she resigned shortly thereafter.

After a brief time with an interim chair, Hannah was appointed as chair. On October 15, 1997, with Dr. Hannah as chair, Carter filed her initial application for tenure. Hannah recommended Carter for tenure and promotion. Her application was then forwarded to the Departmental Promotion and Tenure Committee, which also recommended her for tenure, but not promotion. The application was then forwarded to Dean Gorum for review. Dean Gorum also recommended Carter for tenure. The application was then forwarded to Provost Johnny Toliver, who added his positive recommendation. The application was finally given to President DeLauder.

According to Carter, Hannah then met with President DeLauder multiple times, and gave the president negative information about Carter. Carter alleges that Hannah told DeLauder that Carter was difficult to work with and had said negative things about the university and the department to her students while class was in session. (Carter admits that statements were made regarding course scheduling and registration.) Additionally, Dr. Tossie Taylor told DeLauder that Carter was perceived to be racist by some members of the department. DeLauder did not investigate these allegations, defendants state, because he felt there was no basis for the allegations. DeLauder maintains that the unfounded allegations of racism in no way influenced his review of Carter's application.

Also during this time, Dr. Tolliver told DeLauder that Carter's performance on the National Council for Accreditation of Teacher Education program ("NCATE") was insufficient. The NCATE committee was required to prepare an accreditation report for review. Dr. Tommy Frederick was the chair of the NCATE committee. Carter admits that the entire report - including her portion - was heavily criticized by a mock review board. Although Carter asserts that her portion received fewer criticisms, Frederick noted that Carter's portion of the accreditation report was inadequate and needed to be rewritten. Carter does not refute this fact.

DeLauder admits that he considered the statements of Frederick, Tolliver, Taylor, and Hannah. According to section 8.1.2 of the CBA, however, although value judgments are permissible in the tenure process and persons other than the candidate may be consulted, "documented evidence" must be used to support the decision. (D.I. 99, Ex. A at 22.) None of the statements DeLauder considered were placed in writing. Section 8.2.4 of the CBA further states that "where oral testimony contradicts written evaluations, the affected [tenure applicant] shall be informed of the unit testimony and given an opportunity to respond to it." (*Id.* at 24.) Carter was apparently not given an opportunity to respond to the statements of the other three professors.

In light of all of the evidence, including the oral statements of the three professors, DeLauder remanded - but did not deny - Carter's application for tenure. Upon remand, Hannah, Tolliver, and Gorum all reversed their positive recommendations, based in part on DeLauder's assurance that they could consider the totality of their experience with Carter. Carter was subsequently denied tenure. When Carter met with DeLauder, he informed her that his decision was based upon ineffective service as chair of her department, ineffective service on the NCATE committee, and the fact that she was rated as "3" on her evaluation. Although these are the official reasons, Carter alleges that

DeLauder told Tolliver that tenure was denied because Carter said negative things about the university. Carter further asserts that the "3" she received on her evaluation was a direct product of Dr. Hannah's racism. Carter exhausted her appeals process at the university, and the decision to deny tenure was upheld. Carter subsequently filed this lawsuit.

III. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P 56(c). A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, the court must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). The nonmoving party, however, must demonstrate the existence of a material fact -- not mere allegations -- supplying sufficient evidence for a reasonable jury to find for the nonmovant. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citation omitted). To raise a genuine issue of material fact, the nonmovant "need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the 'mere scintilla' [of evidence] standard." *Petruzzi's IGA Supermarkets, Inc. v Darling-Delaware Co.,* 998 F.2d 1224, 1230 (3d Cir. 1993) (citations omitted). The nonmovant's evidence, however, must be sufficient for a reasonable jury to find in favor of the party, given the applicable burden of proof. *See Anderson*, 477 U.S. at 249-50.

IV. DISCUSSION

The facts related above are either undisputed, or where disputed, the non-moving party's (Carter) verison of the facts. Nevertheless, the court concludes that, even accepting plaintiff's version of the facts as true, she cannot prevail as a matter of law on Count I or Counts IV-X. The court will discuss each of the remaining claims in turn.

A. Count I - Title VII Racial and Gender Discrimination

Carter claims disparate treatment under Title VII. A case for racial discrimination under Title VII can be made in one of two ways. In the *PriceWaterhouse* analysis, a plaintiff must produce direct evidence that race was a motivating factor in the employment decision. *See Armbruster v. Unisys Corp*., 32 F.3d 768, 778 (3d Cir. 1994). "Direct evidence is evidence which, if believed, proves the fact without inference or presumption." *Nixon v. Runyon*, 856 F. Supp. 977, 983 (E.D. Pa. 1994).

Carter has not proven that race was directly involved in her tenure decision. Although Carter alleges that she has direct evidence to prove that both Hannah and DeLauder were racist, the record does not support her contention. Carter urges that the court should find DeLauder was racist because he believed Hannah - an African American woman - over Carter and because he failed to investigate the allegations by Dr. Taylor that Carter was racist. Carter maintains that had he investigated, he would have discovered that Hannah was the true racist. First, as noted above, direct evidence does not permit inferences. It is a large leap of logic to conclude that DeLauder believed Hannah simply because she is African American. There are a number of reasons why a person might believe another person, and there is scant evidence in this record to support the conclusion

that race was the only factor - if it was a factor at all - in DeLauder's decision to credit Hannah's statements. Moreover, the fact that DeLauder did not investigate the allegations of racism against Carter does not prove that he is a racist. He simply could have believed that the allegations were unfounded.[3] Again, direct evidence does not permit speculation, and there are any number of non-racial reasons why DeLauder might have declined to investigate.[4]

Carter has similarly failed to present direct evidence of Hannah's racism. The gist of Carter's allegation against Hannah rests on the fact that Hannah interpreted Carter's alleged statements regarding "putting things in writing" as racist. Carter alleges that Hannah's interpretation was unreasonable and "shows that Hannah's primary focus when considering Carter was her race." (D.I.. 107 at 23.) Hannah's interpretation of Carter's words cannot be considered direct evidence that she harbored racism animus. The court supposes that it is possible that one might infer that simply because an individual identifies a particular trait or tendacy in another, they must also possess that trait or tendancy. Again, however, this would only be an inference -- and, perhaps, an unreasonable one at that. Moreover, it seems entirely reasonable that a person might be able to point out the racism of another without being racist herself. Thus, Carter's argument is logically flawed because,

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[3] In fact, if DeLauder wanted to show true racial animus, he could have used the allegations of racism as a slim excuse to launch into a wholesale investigation of Carter, discredit her, and dredge up reasons to deny her tenure, if that was his goal. Rather, DeLauder wisely decided to take with a grain of salt allegations from faculty that apparently had difficult experiences with Carter.

[4] Moreover, even if DeLauder had investigated the allegations as Carter suggests he should have, there is no guarantee that he would have "uncovered" Hannah's racism as Carter suggests. His focus would have been on *Carter's* alleged racism, not Hannah's. Any discovery of bigotry on Hannah's part would likely have been fortuitous, at best.

if accepted, it would mean that an employer could never take a bigoted employee to task about his or her behavior without running afoul of Title VII. This is a result that the court is unwilling to sanction.[5]

Finally, Carter asserts that the fact that four white women left the department during Hannah's term as chair is direct evidence of Hannah's racism. The record contains no testimony from any of these women regarding their relationship with Dr. Hannah. The only evidence on this point is Carter's affidavit. However, in her own affidavit, Carter acknowledges that one of the professors retired, another professor was denied tenure, and another did not want to accept the assignment Hannah gave her upon return from sabbatical. (D.I. 108 at B-120.) Carter has failed to adduce any evidence of record that demonstrates that any of these women's decisions were directly influenced by Hannah in any way whatsoever - proper or improper. Thus, Carter is essentially asking the court to assume that Hannah was motivated by racism and that these white professors left as a result of that racism. The court is not permitted to, and will not, assume that Hannah's actions were racist in the absence of direct evidence, which Carter has failed to provide. For all of the foregoing reasons, Carter has failed to demonstrate direct evidence of racial animus.[6]

Alternatively, under the *McDonell-Douglas* analysis, the plaintiff can attempt to demonstrate,

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[5] The court notes that Carter's brief focuses solely on racial discrimination and that the record is completely devoid of any facts that would permit the court to conclude that gender was implicated here. For instance, Carter has not alleged that white men or other non-African American men were promoted while she was not. (The only man she mentions is also African American.) Carter has also failed to provide one shred of evidence that would permit the court to properly conclude that any of the parties involved considered gender in their decision making process. Therefore, summary judgment on the gender discrimination claims under Title VII is appropriate.

[6] The court further notes that Carter's brief is completely devoid of authority that would permit the court to find that either DeLauder or Hannah's actions were racially motivated.

through indirect evidence, that the defendants' actions were racially motivated. Under the *McDonell-Douglas*, or "pretext" framework, Carter must first establish a prima facie case of disparate treatment. To prove a prima facie case, Carter must establish that: (1) she is a member of a protected class; (2) she was qualified for the position; and (3) she was subject to an unfavorable employment action "under circumstances that give rise to an inference of unlawful discrimination." *Waldron v. SL Industries, Inc.,* 56 F.3d 491, 494 (3rd Cir.1995). Once Carter has established this, "the burden shifts to the defendant to articulate one or more legitimate, non-discriminatory reasons for its employment decision." *Id.* If the DSU defendants can offer such a non-discriminatory reason, "the presumption of discrimination created by establishment of the prima facie case is dispelled, and the plaintiff must prove that the employer's proffered reason or reasons were pretextual – that is, that they are false and that the real reason for the employment decision was discriminatory." *Id.*

The Court will assume that Carter can make out her prima facie case. Thus, the burden shifts to DSU to demonstrate non-discriminatory reasons for the decision. At least four reasons were given for the denial of Carter's tenure; her ineffectiveness as department chair, her unfavorable classroom commentary on the university, her ineffectiveness on the NCATE committee, and her neutral evaluation. These reasons have nothing to do with Carter's race in particular, and would be relevant to the tenure of a candidate of any race. Thus, DSU has provided non-discriminatory reasons for its decision.

Since DSU has provided non-discriminatory reasons, Carter must demonstrate that DSU's

explanations were false, and the decision was actually improperly motivated by racial considerations. Carter has failed to do so. Carter alleges that pretext can be found based upon: (1) the fact that DeLauder inappropriately considered her service as department chair; (2) DeLauder's conflicting reasons for denying tenure; (3) the fact that African Americans were tenured with performance evaluations similar to hers; (4) the fact that Dr. Hannah acted with racial animus in evaluating her; and (5) the fact that the president lauded her for her participation on the NCATE committee, and then "reversed himself."

First, the court will accept Carter's contention that DeLauder could not consider her service as chair.[7] The court might be concerned if this were the only basis for the denial of tenure. However, DeLauder considered at least three other factors in making his decision. Second, the mere fact that DeLauder asserted three reasons for the denial of tenure to Carter and allegedly added another in a conversation Tolliver will not - standing alone - create pretext. This is so because Carter has yet to prove that any of the reasons are related to her race, or that these factors could not properly be taken into consideration when evaluating an African American candidate.

Third, Carter's contention that African Americans with similar evaluations were tenured is without merit. Assuming that Carter's allegations are true, the fact that an equally qualified candidate - or even a less qualified candidate - was promoted while she was not is insufficient to support a finding of pretext. *See e.g., Odom v. Frank*, 3 F.3d 839, 845 (5th Cir. 1993) ("Generally, a court's belief that an unprotected applicant who has been promoted is less qualified than a protected applicant who has been passed over, will not, in and of itself support a finding of pretext

[7] The court will accept this contention although it is based upon deposition testimony and not a written university policy. (D.I. 108 at B-77.)

for discrimination."); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988) (same). Moreover, as defendants point out, tenure is not an entirely objective process. Both parties agree that the tenure process also contains a subjective element. Indeed, the CBA clearly states that judgmental factors may be considered. (D.I. 99, Ex. A at 24.) The CBA further states that "[p]romotion and tenure are not automatic." (*Id.* at 23). Thus, assuming Carter met all of the objective criteria, DSU was not obligated to grant her tenure. It was free to base its decision on subjective criteria.

Fourth, there is no reason to believe that Dr. Hannah's evaluation of Dr. Carter was racially motived. If Carter was given an exceedingly poor evaluation, a "1" or a "2" perhaps, the court might be inclined to consider whether racial animus was involved. However, all parties agree that an evaluation of "3" is considered neutral. An evaluation is an inherently subjective mechanism, and Carter has failed to demonstrate that DSU evaluations were based on objective criteria. Moreover, Carter has failed to demonstrate why the "3" was deserved or undeserved. The court did not work with Dr. Carter on a daily basis. Thus, in the absence of some evidence to suggest that the "3" was clearly unwarranted, and therefore may have been racially motivated, the court will not second guess Hannah's assessment. Most important, Carter herself admits that persons with neutral, "3" evaluations were tenured. In light of this fact, Hannah's neutral evaluation cannot be considered as a deliberate attempt to hinder Carter's career at the university based on her race.

Finally, the fact that President DeLauder commended Carter on her NCATE efforts does not outweigh the fact that her end product was apparently inadequate. If DeLauder's letters had expressly commented on the quality of Carter's work, or if he had supervised her on the project, the court might take his "reversal" more seriously. However, the facts do not indicate that DeLauder

worked with, supervised, or otherwise had reason to know of the allegedly defective nature of the plaintiff's work product. At the time he was writing his note of thanks, he had no reason to know that Dr. Frederick had to re-write Carter's portion of the project. Once DeLauder was made aware of this information, he changed his recommendation. Thus, DeLauder's changed assessment was based upon newly acquired - and relevant - information, rather than racial bias.[8]

In sum, the court concludes based on the record before it, there is no direct evidence of racial animus. Furthermore, DSU has provided non-discriminatory reasons for its tenure decision. Carter has failed to prove that these reasons were a mere pretext. Thus, she has also failed to prove indirect racial animus. Therefore, the court will grant summary judgment for the defendants on this claim.

B. Counts II, III, and IV - Section 1981, Section 1983, Section 1985, Section 1986 and Civil Conspiracy

The plaintiff concedes that the Eleventh Amendment prevents her from suing DSU on any of the statutory claims. The court will, therefore, grant summary judgment for DSU on these claims. However, the Eleventh Amendment will not prevent Carter from obtaining prospective, injunctive relief against the individual defendants in their official capacity. The court must therefore determine whether the individual defendants are entitled to summary judgment on any of these claims.[9]

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[8] The court notes that Dr. Hannah's work on the NCATE project was also criticized, as was the work of the entire NCATE committee. However, what distinguishes Carter from Hannah is that there is no record evidence indicating that Hannah's portion had to be completely rewritten as was Carter's.

[9] The individual defendants have not moved for summary judgment on the section 1981 claims. Thus, the court will not discuss this claim or grant summary judgment for the defendants on this claim.

1. Section 1983

The §1983 claims are not barred. The Eleventh Amendment bars § 1983 claims against state entities and state officials sued in their official capacity. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). This is because only "persons" can be sued under § 1983, and the state is not considered a person. However, where the plaintiff is seeking prospective injunctive relief against defendants in their official capacities, the defendant will be considered a person. *See id.* n. 10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State."). In the present case, the parties agree that the § 1983 claim is for prospective injunctive relief against the defendants in their official capacity. Thus, according to the Supreme Court's reasoning in *Will*, those claims should be allowed to proceed. The court will, therefore, deny summary judgment on this claim.

2. Section 1985, Section 1986 & Civil Conspiracy

The defendants are entitled to summary judgment on the § 1985, § 1986, and civil conspiracy claims. At the outset, the court notes that if there is no violation of §1985, there can be no violation of § 1986. *See* 42 U.S.C. § 1986 (limiting liability to those who fail to prevent any of the wrongs "mentioned in section 1985 of this title."). *See also Boykin v. Bloomsburg University of Pennsylvania*, 893 F.Supp. 409, 418 (M.D. Pa.1995) (noting that § 1986 violation is premised on violation of § 1985). Similarly, if neither of these statutes are implicated, the claim for civil conspiracy must be dismissed because civil conspiracy claims cannot stand alone without some independent statutory violation. *See Phoenix Canada Oil Co. Ltd. v. Texaco Inc.*, 560 F.Supp. 1372,

1388 (D.Del. 1983) ("Delaware courts do not recognize independent actions for civil conspiracies."); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 2001 WL 1671441, at *18 (Del.Ch. Dec 20, 2001)

("Civil conspiracy is not an independent cause of action, but requires proof of underlying wrong that would be actionable absent conspiracy."). Since the viability of all three claims turns on the validity of the §1985 claim, the court will focus on that issue.

The §1985 claim is not viable for two reasons. First, assuming that Carter could prove that a conspiracy took place, "a conspiracy claim [under §1985] requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals." *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977). Additionally, that intentional discrimination must occur on the basis of an impermissible criterion such as race or gender. *See id.* (noting that gender is an acceptable form of animus). For the reasons discussed above, however, Carter has failed to clearly demonstrate that racial animus motivated the defendants' decision. Since Carter cannot meet this burden, her claim must fail.

Additionally, assuming Carter could prove a racially motivated conspiracy, in order to be actionable under § 1985, a conspiracy must involve more than one state or private agency. *See id.* ("[A] person cannot conspire with himself and therefore for the agents of a single corporation to conspire among themselves and not with outsiders does not state a cause of action under 1985(3).") *Id.* In the present case, each of the defendants is a member of the same institution - DSU. There are no allegations that other state officials or private persons were involved in this alleged conspiracy. Therefore, the court finds that the defendants are entitled to summary judgment on the § 1985 claim, as well as the §1986 and civil conspiracy claims.

C. Count VI - Fourteenth Amendment/Due Process

The gist of Carter's claim is that DSU failed to follow established procedure, and in so doing deprived her of constitutional due process rights. Again, Carter's claim must fail. As the Carter notes, in order to establish a procedural due process violation, she must prove that she was objectively entitled to tenure and did not merely have an expectation of promotion. Carter cites *Gronowicz v. Pennsylvania State University*, No. 97-656, 1997 WL 799438 (E.D. Pa. 1997), in support of her argument.

The record does not reveal that Carter was objectively entitled to tenure. The defendants point out that the *Gronowicz* court also stated that a plaintiff must demonstrate that "the procedures at issue so limit the University's discretion that he was objectively entitled to tenure and did not merely subjectively expect a promotion." *Id.* at *5. As previously noted, the DSU tenure process permitted subjective, judgmental decisions. Again, the CBA specifically mentions judgmental factors and notes that "promotion and tenure are not automatic." (D.I. 99, Ex. A at 23). Thus, the court cannot conclude that the DSU tenure process was so objective as to give plaintiff more than a mere, subjective expectancy of tenure. The court will, therefore, grant summary judgment on this issue.

D. Count VIII - Breach of Contract
Count IX - Intentional Infliction of Emotional Distress

Counts VIII and IX will be considered together because they present the same issue - namely whether state law claims such as breach of contract and intentional infliction of emotional distress are barred by the Eleventh Amendment. The court concludes that they are. As the defendants note,

"pendent state law claims against state entities and officers are barred by the Eleventh Amendment." *McKay v. Delaware State University*, C.A.No. 99-219, 2000 WL 1481018, at *12 (D. Del. Sept. 29, 2000). The claims for intentional infliction of emotional distress and breach of contract clearly arise under state law. Although plaintiff asserts that the Eleventh Amendment will not bar prospective injunctive relief on these claims, a district court may only order prospective injunctive relief for claims arising under the Constitution or a federal statute. *See Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647, 656 (3d Cir. 1982), rev'd on other grounds, 456 U.S. 89 (1984) ("[The] Eleventh Amendment is no bar to the prospective injunctive relief which was ordered by the district court insofar as that relief is predicated on *constitutional* or *federal statutory* claims.") (emphasis added). As previously mentioned, these claims do not arise under federal statutory or constitutional law, and therefore do not fit into this narrow exception. Thus, the court will grant summary judgment for all defendants on both claims.[10]

[10] The court notes that Carter suggests that there has been insufficient discovery and therefore, the defendants' motion for summary judgment is premature. Although a court can reserve judgement on a motion for summary judgment under Federal Rule of Civil Procedure 56(f), the party seeking such relief must request present affidavits to the court explaining why further discovery is necessary. *See Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 779 (3d Cir. 1983) ("Where Rule 56(f) affidavits have been filed, setting forth specific reasons why the moving party's affidavits in support of a motion for summary judgment cannot be responded to, and the facts are in the possession of the moving party, we have held that a continuance of the motion for purposes of discovery should be granted almost as a matter of course."). In the present case, Carter has failed to submit affidavits demonstrating why more discovery is necessary. Thus, the court sees no bar to the grant of summary judgment.

E. Count X - Punitive Damages

Carter is not eligible for punitive damages. As the defendants noted, in order to recover punitive damages, Carter must show that DSU and the defendants "acted with malice or reckless indifference to [her] federally protected rights." *Lafate v. Chase Manhattan Bank (USA)*, 123 F. Supp. 2d 773, 784 (D. Del. 2000). The record is devoid of any facts that would permit the court to find that the defendants acted maliciously. In fact, Carter did not brief this issue, and therefore has failed to direct the court to facts that would support a finding of malice. A careful review of the record shows that it does not support a finding that the defendants acted with racial animus, and thus purposefully deprive Carter of her constitutional rights. Therefore, Carter cannot recover punitive damages.

V. CONCLUSION

For all of the foregoing reasons, Carter's motion for summary judgment is denied. The court will, therefore, grant summary judgment for all defendants on Count I and Counts IV-X. Although DSU is also entitled to summary judgment on Counts II and III, the court will deny summary judgment on those claims as to the individual defendants. Nevertheless, the § 1981 and §1983 claims in Counts II and III will be limited to prospective injunctive relief against the individual defendants in their official capacities.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The plaintiff's Motion for Partial Summary Judgment (D.I. 98) is DENIED;

2. The defendant's Motion for Summary Judgment (D.I. 95) is GRANTED in part and DENIED in part;

3. Summary Judgment BE AND HEREBY IS ENTERED in favor of the defendant Delaware State University on all claims;

4. Summary Judgement BE AND HEREBY IS ENTERED in favor of the defendants DeLauder, Tolliver, Hannah, and Gorum, the Board of Trustees on all claims EXCEPT the section 1981 claims stated in Count II of the complaint and the section 1983 claims stated in Count III of the complaint;

5. The claims in Count II and Count III will be limited to prospective injunctive relief.

Dated: February 27, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE