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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PERRY MILLS,

11 Plaintiff,

12 v.

13 ANDREW BODMAN, in his official capacity and
in his individual capacity,

14 Defendant.

CASE NO. C05-1315C

ORDER

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16 This matter comes before the Court on Plaintiff's Motion for Preliminary Injunction and
17 Memorandum in Support of Motion (Dkt. No. 12) ("Pl.'s Mot. Inj."), Defendant's Opposition to Motion
18 for Preliminary Injunction and Memorandum in Opposition to Motion (Dkt. No. 19) ("Def.'s Opp'n"),
19 Plaintiff's Reply Brief in Support of Motion for Preliminary Injunction, and Motion to Strike Defendant's
20 Overlength Brief (Dkt. No. 25) ("Pl.'s Reply"), and Defendant's Declaration of Beatrice Lange
21 Regarding Font Size on Defendant's Opposition Brief to Motion for Preliminary Injunction (Dkt. No. 33)
22 ("Lange Decl."). Having considered the papers submitted by the parties and finding oral argument
23 unnecessary, the Court DENIES Plaintiff's motion for a preliminary injunction and also DENIES
24 Plaintiff's motion to strike Defendant's brief, for the following reasons.

25 //

26 ORDER – 1

1 **I. BACKGROUND**

2 On July 27, 2005, Plaintiff Perry Mills, a tenured professor at Western Washington University
3 (“WWU”), filed this action against Defendant Andrew R. Bodman, the Provost and Vice President for
4 Academic Affairs for WWU, alleging seven counts of deprivation of constitutional rights under color of
5 state law pursuant to 42 U.S.C. § 1983 and two pendent state law contract claims. (Compl. for Inj.
6 Relief and for Damages 1–2, 7–10 (Dkt. No. 1) (“Compl.”); *see also* Am. Compl. for Inj. Relief and for
7 Damages (Dkt. No. 17) (“Am. Compl.”.) On August 18, 2005, Plaintiff filed this motion for a
8 preliminary injunction.

9 Facts relevant to the instant motion are as follows. Plaintiff was appointed as a tenured professor
10 in WWU’s Drama Department in the fall of 1994, and taught Drama Department classes every year
11 thereafter. (Am. Compl. 2.) However, on October 18, 2004, Defendant suspended Plaintiff with pay.
12 (*Id.* at 3.) The reason given for the suspension was to review complaints received from faculty and
13 students. (*Id.*) Plaintiff was told that he would not be permitted access to campus during the suspension
14 without prior notification of his department chair and a University Police escort. (*Id.*) Violation of these
15 terms was said to be potentially criminal as well as grounds for further discipline. (*Id.*) Defendant had
16 someone else take over Plaintiff’s classes for the rest of the fall of 2004, and Plaintiff has not taught
17 classes since; nor is he scheduled to teach in the present term (fall 2005). (*Id.* at 3, 6.) Plaintiff has
18 suffered no loss in income or benefits during the suspension. (Def.’s Opp’n 6.) No suspension length
19 was specified, and Plaintiff’s suspension has continued uninterrupted since October 18, 2004. (Am.
20 Compl. 5–6.)

21 Plaintiff states in his complaint that the requisite *Faculty Handbook of Western Washington*
22 *University* (“*Handbook*”) conditions justifying suspension were not satisfied in his case. (*Id.* at 3–5.)
23 No formal Statement of Charges was filed prior to the suspension, but a Statement of Charges was
24 eventually filed on or about June 6, 2005. (*Id.* at 5.) Plaintiff also states in his complaint that Defendant
25 has violated the *Handbook* hearing procedures for charges against a professor. (*Id.* at 7.) Negotiations

1 between Plaintiff and WWU have occurred on and off since November 2004. A five-person faculty panel
2 is now scheduled to hold an administrative disciplinary hearing on the suspension, and these proceedings
3 will commence on October 5, 2005. (Letter from James E. Lobsenz, Att’y for Pl. (Sept. 16, 2005) (Dkt.
4 No. 34).)

5 Plaintiff brought seven constitutional claims, all of which revolve around procedural due process
6 and the First Amendment,¹ and two pendent state law contract claims. Plaintiff’s two pendent state law
7 contract claims² now have been dismissed pursuant to an Order of this Court. (See Dkt. No. 36.)
8 Accordingly, arguments on the instant motion stemming from Plaintiff’s contract claims will not be
9 considered when determining whether to grant a preliminary injunction.

10 The instant motion seeks a three-fold injunction that would (1) prohibit Defendant from
11 suspending or discharging Plaintiff; (2) prohibit Defendant from barring Plaintiff from campus; and (3)
12 order Defendant to allow Plaintiff to resume his “normal teaching duties.” (Pl.’s Mot. Inj. 1.) As to the
13

14 ¹ Plaintiff’s constitutional claims allege the following: (1) deprivation of Plaintiff’s right to
15 procedural due process by Defendant’s failure to follow rules and regulation set forth in the *Handbook*;
16 (2) violation of Plaintiff’s right to pre-deprivation procedural due process by Defendant’s suspension of
17 Plaintiff from his faculty position and eviction of Plaintiff from campus without first affording notice of
18 complaints against him, evidence in support thereof, and an opportunity to respond; (3) deprivation of
19 Plaintiff’s right to procedural due process by Defendant’s failure to provide a reasonably prompt post-
20 deprivation hearing; (4) deprivation of Plaintiff’s First Amendment right to freedom of speech by
21 Defendant’s imposition of two unconstitutional prior restraints; (5) deprivation of Plaintiff’s First and
22 Fourteenth Amendment rights to fair notice of prohibited behavior by Defendant’s reliance on *Handbook*
23 regulations that are unconstitutionally vague as applied to Plaintiff’s conduct; (6) deprivation of Plaintiff’s
24 First Amendment right to freedom of speech and freedom to petition by Defendant’s suspension of
25 Plaintiff in retaliation for Plaintiff’s complaint against another professor; and (7) deprivation of Plaintiff’s
26 First Amendment right to freedom of speech by Defendant’s suspension of Plaintiff for having made
27 remarks to students and other faculty that were within the protective ambit of the First Amendment
28 regardless of their offensiveness to some. (Am. Compl. 8–10.)

² Plaintiff’s contract claims alleged (1) that by suspending Plaintiff prior to filing any Statement of
Charges and by imposing a suspension without complying with the relevant *Handbook* provisions,
Defendant breached the employment contract with Plaintiff; and (2) that by initiating disciplinary
proceedings against Plaintiff on grounds not authorized by the *Handbook*, Defendant breached the
employment contract with Plaintiff. (Am. Compl. 7–9.)

1 first, Plaintiff also seeks dismissal of the entire disciplinary proceeding against him. (*Id.* at 18 (citing
2 *United States v. 295 Ivory Carvings*, 689 F.2d 850 (9th Cir. 1982).)

3 **II. ANALYSIS**

4 In order to obtain a preliminary injunction, Plaintiff “must demonstrate either ‘(1) a combination
5 of probable success on the merits *and* the possibility of irreparable harm; *or* (2) that serious questions are
6 raised and the balance of hardships tips in [his] favor.’” *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217,
7 1221 (9th Cir. 2003) (quoting *A & M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.
8 2001)) (emphasis added). “The formulas do not differ, but reflect ‘two points on a sliding scale in which
9 the degree of irreparable harm increases as the probability of success on the merits decreases.’” *Id.*
10 (quoting *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1410
11 (9th Cir. 1991)). Further, “[u]nder any formulation of the test, *plaintiff must demonstrate that there*
12 *exists a significant threat of irreparable injury.*” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762
13 F.2d 1374, 1376 (9th Cir. 1985) (emphasis added).

14 Plaintiff’s suspension with pay has caused him no financial injury. The harms Plaintiff alleges are
15 to his First Amendment freedoms (Pl.’s Mot. Inj. 5) and his property rights in his tenured position (*Id.* at
16 11). Further, he cites loss of “opportunity to teach his students, advance his academic career, exercise his
17 academic freedom,” and not being able to “set[] foot on the campus of a public university without
18 undergoing the humiliation of a mandatory police escort.” (*Id.* at 16.) He also cites damage to
19 reputation. (*Id.* at 17.) Plaintiff’s motion presents four due process arguments, two contract arguments
20 (which will be disregarded due to this Court’s dismissal of the state law contract claims), and two First
21 Amendment arguments in support of the motion.

22 As a preliminary matter, the Court notes that this case is in the early stages of factual
23 development, and it is not possible at this juncture to determine what “the facts” are. Both sides have
24 presented voluminous declarations and exhibits to accompany their pleadings on the motion for a
25 preliminary injunction. Much of the evidence contains contradictory renditions of events at issue on this

1 motion. Not only that, the bitterly disputed facts must be resolved in order to fully consider the merits of
2 Plaintiff's underlying claims. This Order on Plaintiff's motion for a preliminary injunction is not the
3 proper forum to make such binding findings of fact.

4 **A. First Amendment Claims**

5 Plaintiff made multiple First Amendment claims in his Amended Complaint, but only presented
6 two in support of his motion for a preliminary injunction: (1) a prior restraint in his prohibition from
7 campus; and (2) a prior restraint in his prohibition from teaching due to the suspension. (*See* Pl.'s Mot.
8 Inj. 19–26, 34 n.3; Pl.'s Reply 14–15.)

9 Defendant acknowledges that the “loss of First Amendment freedoms, for even minimal periods of
10 time, constitutes irreparable injury.” (Def.'s Opp'n 9 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).)
11 However, “[t]o establish irreparable injury in the First Amendment context,” Plaintiff must demonstrate
12 “the existence of a colorable First Amendment claim.” *Brown*, 321 F.3d at 1225. Thus, as to Plaintiff's
13 First Amendment claims, this Court must determine whether Plaintiff has met his burden of making a
14 colorable claim on either of the two prior restraint theories. A colorable claim is one that is not “wholly
15 insubstantial, immaterial, or frivolous.” *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 2002). A “prior
16 restraint” necessarily involves protected speech.

17 Defendant counters both of Plaintiff's prior restraint claims with the argument that Plaintiff's
18 conduct—allegedly wielding a knife and creating a threatening environment for students, using sexist and
19 derogatory slurs when referring to colleagues, intimidating others outside the classroom, and using
20 “fighting words”—is not even protected speech. (Def.'s Opp'n 26.) This conduct was alleged to have
21 occurred both in common areas on the campus and in the classroom, thus making it relevant to *both* of
22 Plaintiff's prior restraint claims. To the extent that Defendant was seeking to prevent Plaintiff from
23 engaging in unprotected conduct like this in the future, Defendant's actions could not possibly constitute
24 a prior restraint. Plaintiff responds only by explaining that his conduct was actually protected speech.
25 (*See* Pl.'s Reply 15–16.) The Court declines to determine on the limited record before it whether

1 Plaintiff's conduct is protected speech or not. Thus, at this time, there are no clear losses of First
2 Amendment freedoms that would require a finding of irreparable injury.

3 Returning to the "colorable claim" test, the Court cannot find the Plaintiff's prior restraint claims
4 "not wholly insubstantial, immaterial, or frivolous." If Plaintiff's conduct is not speech in the first place,
5 he cannot have a colorable claim. He may prove his claim colorable and his speech protected later in this
6 litigation, but has not yet done so. Because Plaintiff has failed to prove a colorable prior restraint claim,
7 he has failed to show irreparable injury under the first *Brown* test, quoted *supra*, a test which both parties
8 rely upon in their briefing on this motion.

9 Moreover, even if "serious questions are raised," given the severe consequences to the university
10 community and the safety of the students and faculty if Plaintiff's conduct is as bad as Defendant says it
11 is, the Court cannot find that the balance of hardships "tips in Plaintiff's favor" as he awaits his
12 administrative hearing at WWU and the further development of this lawsuit. Plaintiff's prior restraint
13 arguments therefore fail the second *Brown* test as well.

14 **B. Due Process Claims**

15 Plaintiff's motion sets forth the following due process violations to support a preliminary
16 injunction, each of which also was raised in his Amended Complaint: (1) failure to follow WWU's own
17 *Handbook* rules; (2) failure to provide notice of the charges, evidence in support of the charges, or an
18 opportunity to be heard; (3) failure to provide a reasonably prompt postdeprivation hearing; and (4)
19 basing charges on a vague contract. (Pl.'s Mot. Inj. 9–19, 31–34.)

20 In contrast to the First Amendment context, where the Plaintiff must merely show a colorable
21 claim to establish irreparable injury, a more stringent standard applies to the balance of Plaintiff's
22 arguments for a preliminary injunction—arguments which are all premised on due process violations.
23 The traditional preliminary injunction test applies here, without any easing of the Plaintiff's burden to
24 show irreparable injury. If Plaintiff fails to show irreparable injury, he cannot have an injunction under
25 the first *Brown* test *regardless* of the merits of his due process claims. The Court addresses this issue

1 first.

2 As he makes his due process arguments, Plaintiff fails to define anywhere in his motion whether
3 he is claiming deprivation of liberty interests, property interests, or both, instead preferring to talk about
4 his right to teach, to advance his career, and to exercise academic freedom. In contrast, Defendant
5 discusses Plaintiff's property interests at length, arguing that the deprivations are either not significant or
6 fully able to be redressed by his lawsuit via damages and other legal remedies. (Def.'s Opp'n 9.) Plaintiff
7 points out that Defendant focuses solely on property interests, while the Due Process Clause protects
8 liberty and intangible interests as well, such as free speech. (*See* Pl.'s Reply 8.) However, because he has
9 not made a colorable claim on First Amendment bases, it helps Plaintiff none to incorporate those
10 interests by reference into his due process arguments for the injunction, for which he must show
11 irreparable harm under the stricter standard. Further, whereas Plaintiff has not specifically defined the
12 nature of the non-speech interests at issue here, this Court declines to presume that these undefined
13 interests can be protected *only* by an injunction and not by damages or other legal remedies.

14 Plaintiff has kept his full salary and benefits throughout the suspension and has been engaged in a
15 settlement and negotiation process regarding his suspension. He allegedly has caused some of the
16 procedural delays himself and also waived timeliness requirements. He has not been terminated, and
17 there is no way to determine at this stage whether any future termination would implicate due process
18 concerns. Further, for all Plaintiff knows, the October 2005 hearing will result in lifting his suspension.
19 At that point, the Court presumes that any violations of due process that occurred up until then can be
20 redressed in this lawsuit, as can any violations that may occur as a result of the hearing. More
21 importantly, much of the harm Plaintiff alleges has already been done and cannot be reversed, so an
22 injunction would serve no purpose but to interfere with WWU's internal hearing procedures, which are
23 an avenue to actually provide some process to Plaintiff. The Court finds that Plaintiff has not shown that
24 he will suffer any irreparable injury. He may seek to cure any injury he will suffer or already has suffered
25 through prosecution of this lawsuit and his attendant requests for legal remedies and damages. Because

1 Plaintiff has not demonstrated a significant threat of irreparable injury in regard to his due process rights,
2 this Court does not reach the issue of his likelihood of success on the merits of those claims.

3 Finally, even if “serious questions are raised” by Plaintiff’s due process claims, the Court cannot
4 find that the balance of hardships “tips in Plaintiff’s favor,” where he has suffered no loss of pay and
5 benefits and has not made a showing that his other interests can be redressed only by a preliminary
6 injunction. Plaintiff therefore fails the second *Brown* test here too.

7 **III. CONCLUSION**

8 The Court finds that Plaintiff has not met the burdens set forth in *Brown* as to his First
9 Amendment claims or his due process claims. Therefore, the Court hereby DENIES Plaintiff’s motion
10 for a preliminary injunction.

11 The Court notes that Defendant’s pleadings appear to be out of sync with the font-size and line-
12 spacing requirements, but declines to strike his Opposition brief. The Court hereby DENIES Plaintiff’s
13 motion to strike.

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15 SO ORDERED this 4th day of October, 2005.

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18 John C. Coughenour
19 United States District Judge
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