

of contract, 4) defamation; and, 5) wrongful termination. Although defendants' motion to dismiss states three grounds for dismissal, the threshold issue is whether this court has subject matter jurisdiction. The standard for dismissal pursuant to Civ.R. 12(B)(1) is whether plaintiff has alleged any cause of action that is cognizable in this forum. Further, Civ.R. 12(B)(1) permits a trial court to look beyond the pleadings and consider evidentiary materials to determine whether it possesses jurisdiction to hear the case. See *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211. As discussed below, this court is without subject matter jurisdiction to grant plaintiff's request for preliminary and permanent injunctions or to hear his federal and state law claims.

FIRST CAUSE OF ACTION:²

{¶3} TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

{¶4} In plaintiff's initial complaint, filed February 1, 2002, he requested a temporary restraining order (TRO) and preliminary and permanent injunctions. On February 8, 2002, after an evidentiary hearing was held with regard to the request for a TRO and preliminary injunction, this court concluded:

{¶5} "Upon review of testimony and other evidence presented at the hearing and the arguments of counsel, the court finds that it is without subject matter jurisdiction to issue the specific relief requested. Accordingly, the court DENIES plaintiff's application for a TRO and preliminary injunction."

{¶6} When plaintiff filed his amended complaint he reasserted his request for preliminary and permanent injunctions. The facts and allegations surrounding the request for the TRO and preliminary

injunction contained in the initial complaint are virtually identical to the request for preliminary and permanent injunctions stated in the amended complaint. As it has previously held, this court simply does not have subject matter jurisdiction to grant the requested relief. Thus, plaintiff's claims for preliminary and permanent injunctions are DISMISSED.

SECOND CAUSE OF ACTION:

SECTION 1983, TITLE 42, U.S. CODE CLAIM

{¶7} In his second cause of action, plaintiff alleges that several Ohio Air National Guard (OANG) officers, under color of state law, attempted to destroy his career by engaging in a pattern of publishing, promoting and otherwise disseminating false information regarding plaintiff's personality, leadership ability and job performance. Plaintiff claims, in effect, that defendants deprived him of his constitutionally protected right to be employed as a technician and his right to a promotion. Plaintiff also alleges that defendants refuse to provide plaintiff with a hearing in regard to his termination from service, in violation of his right to due process.

{¶8} When suit is brought against the state, the proper forum is the Court of Claims. R.C. 2743.02(F). In addition, when a party files a civil action against an officer or employee of the state and the complaint "alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner," the complaint must first be filed against the state in the Court of Claims. *Id.* See, also, *Turner v. Alexander* (1995), 107 Ohio App.3d 853, 857.

{¶9} Plaintiff's amended complaint alleges that the Adjutant General and individual officers of the OANG violated Section 1983

by depriving plaintiff of his civil rights. Plaintiff also alleges that the actions of the individual OANG officers were "manifestly outside of the scope of their official duties and conducted with malicious purpose, in bad faith and/or in a wanton and reckless manner." Thus, pursuant to R.C. 2743.02(F), the proper forum to resolve the issue appears to be the Court of Claims. However, the Court of Claims is without subject matter jurisdiction to hear plaintiff's Section 1983 claim, inasmuch as the state is not a "person" within the meaning of Section 1983. *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170, 171. An action under Section 1983 may not be maintained in the Court of Claims against the state. *Id.* at 171. *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230 (state of Ohio cannot be liable for claims based on federal law). Thus, plaintiff's Section 1983 claim is dismissed.

THIRD AND FIFTH CAUSES OF ACTION:

CIVIL CONSPIRACY AND DEFAMATION CLAIMS

{¶10} Plaintiff claims that he was defamed by defendants by and through their agents. Plaintiff also claims that defendants conspired to defame him.

{¶11} As stated in plaintiff's complaint, the agents of defendants were officers of the OANG. R.C. 2743.02(G) provides, in pertinent part:

{¶12} "Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or commission complained of, subject to the 'Federal Tort Claims Act,' *** then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section."

{¶13} Those officers who are alleged to have defamed and conspired against plaintiff were subject to the Federal Tort Claims

Act (FTCA), and therefore the exclusive remedy for plaintiff is governed by the provisions of the FTCA. Thus, even if the officers in question were employees of the state for the purposes of this action, the state of Ohio cannot be liable for their acts pursuant to R.C. 2743.02(G). Therefore, plaintiff's defamation and conspiracy claims are dismissed.

FOURTH CAUSE OF ACTION: BREACH OF CONTRACT

{¶14} Plaintiff's amended complaint states that, in or about 1997, defendants attempted to terminate plaintiff's employment. To resolve the issue, defendants entered into a settlement agreement with plaintiff. Plaintiff now alleges that defendants failed to comply with the terms of the settlement agreement. Defendants argue, however, that any cause of action arising from an alleged breach of contract is barred by the statute of limitations.

{¶15} The statute of limitations in the Court of Claims is set out in R.C. 2743.16(A), which provides:

{¶16} "Subject to division (B) of this section, civil actions against the state permitted by section 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶17} Plaintiff had two years from the accrual of his cause of action within which to file his claim for breach of contract.

The settlement agreement was signed by all parties on July 2, 1997. Plaintiff claims that after signing the agreement defendants refused to comply with the terms of the agreement. Plaintiff states, "Defendant State of Ohio has breached the settlement agreement by failing to purge plaintiff's records and disseminating the same to third parties." According to the terms of the settlement agreement, defendants had five days after the signing of the settlement agreement (until July 7, 1997), to remove certain

documents pertaining to plaintiff's termination from his personnel file. In addition, defendants had until July 18, 1997, to remove any adverse or negative entries pertaining to plaintiff and maintained by Major Mark Gebhard. When defendants failed to remove these items by July 7, 1997, and July 18, 1997, they breached the settlement agreement. Thus, plaintiff's cause of action accrued no later than July 18, 1997.

{¶18} According to the applicable statute of limitations, plaintiff's justiciable breach of contract claim could be filed no later than July 19, 1999. However, his claim was not filed until February 1, 2002. It is clear that the breach of contract claim was not timely filed. Therefore, the claim is dismissed.

SIXTH CAUSE OF ACTION: WRONGFUL TERMINATION

{¶19} Plaintiff alleges in his complaint that defendants violated Section 709, Title 32, U.S. Code. More specifically, plaintiff claims that defendants violated Section 709(f)(2) and (5) by failing both to afford him a due process hearing prior to the termination of his position and to give him adequate notice of termination. Sections 709(f)(2) and (5) provide in pertinent part:

{¶20} "Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned-

{¶21} "(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

{¶22} "***

{¶23} "(5) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days

before the termination date of such employment." Plaintiff argues that Section 709(f)(2) contains a "just cause" requirement and that a technician can only be terminated after a finding of cause following a due process hearing. Plaintiff further claims that he did not receive a timely "thirty day notice" letter, as required by Section 709(f)(5).

{¶24} Defendants maintain that plaintiff's termination from service is not justiciable. Relying on the holding in *Leisitko v. Stone*, 134 F.3d 817 (6th Cir. 1998), defendants argue that federal employees are denied the right to judicial review of an adverse personnel action. Defendants are correct in that assertion. The exclusive remedy for a federal employee's claim of improper dismissal is contained in the Civil Service Reform Act (CSRA) of 1978. See *United States v. Fausto* (1988), 484 U.S. 439. Thus, a federal employee may not obtain judicial review for an adverse personnel action if the CSRA does not provide a right of review. *Id.* at 443-44.

{¶25} The CSRA requires an initial determination by the Merit Systems Protection Board (MSPB) on any adverse personnel actions. However, the National Guard Technicians Act limits the MSPB's review of a national guard technician's termination. Pursuant to 32 U.S.C. Section 709(f)(2), as stated above, the Adjutant General can remove an employee for cause. Section 709(f)(4) provides that, "a right of appeal which may exist *** shall not extend beyond the adjutant general of the jurisdiction concerned." In short, a technician in the National Guard must exhaust his administrative remedies by appealing his dismissal to the Adjutant General.

{¶26} After the administrative appeal, a technician is prohibited from seeking judicial review. See *Bradley v. Stump*, 971 F. Supp. 1149, 1156 (W.D. Mich. 1997), affirmed, 149 F.3d 1182 (6th Cir. 1998), ("Guard technicians' challenges to discharge by the

Guard and termination from technician employment are nonjusticiable because judicial review would seriously impede the military in performance of its vital duties.") Therefore, plaintiff's wrongful termination claim is dismissed.

{¶27} For the foregoing reasons, defendants's motion to dismiss is GRANTED.

JUDGE

Entry cc:

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