

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

JEFFREY GREEN,	)	
	)	CASE NO. 09 MA 48
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
OHIO LOTTERY COMMISSION,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,  
Case No. 07CV899.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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Attorney John McNally, IV  
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Youngstown, Ohio 44503

For Defendant-Appellee:

Attorney Richard Cordray  
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JUDGES:

Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: December 4, 2009

VUKOVICH, P.J.

¶{1} Plaintiff-appellant Jeffrey Green appeals from the decision of the Mahoning County Common Pleas Court granting defendant-appellee Ohio Lottery Commission's (OLC) motion to dismiss for lack of subject matter jurisdiction. The issue raised in this appeal is whether the common pleas court has jurisdiction over a wrongful discharge claim based upon a public policy, specifically the right to freedom of speech, found in the United States and Ohio Constitutions. For the reasons expressed below, we find that it does not and, as such, the judgment of the trial court is affirmed.

#### STATEMENT OF CASE

¶{2} Green was an unclassified employee with OLC from May 1993 until he was terminated in October 2005. Following his termination, he filed a complaint seeking monetary damages against OLC in the common pleas court for race discrimination, wrongful termination based on public policy of free speech, and equitable estoppel.

¶{3} OLC answered the complaint and asserted as a defense that the common pleas court lacked subject matter jurisdiction over the claims. It also filed a motion to dismiss indicating that the claims made fall within the exclusive jurisdiction of the Court of Claims. Green filed a response to the motion to dismiss claiming that the Court of Claims has no jurisdiction over United States and Ohio constitutional violations. Thus, according to Green, his claims were properly filed in the common pleas court.

¶{4} The trial court overruled the motion to dismiss. However, OLC filed a motion for reconsideration and memorandum in support explaining why the common pleas court lacked subject matter jurisdiction. It asserted that Green's claims in the complaint sounded in tort. According to it, tort claims asserted against the state are within the exclusive jurisdiction of the Court of Claims, not the common pleas court. Green responded to the motion and reasserted his argument that the Court of Claims has no jurisdiction over the claims.

¶{5} The trial court reconsidered its earlier ruling and found merit with the motion to dismiss. Green timely appeals.<sup>1</sup> The arguments raised in his appeal concern the dismissal of his third cause of action that alleged that he was wrongfully terminated for “engaging in free speech.” In this appeal, Green does not argue that the dismissal of his other causes of action were in error and, in fact, it appears that he concedes that the Court of Claims does have exclusive jurisdiction over those claims. Accordingly, this appeal only addresses whether the dismissal of the third cause of action was incorrect.

#### ASSIGNMENT OF ERROR

¶{6} “WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE COURT OF CLAIMS HAS ORIGINAL AND EXCLUSIVE JURISDICITON OVER APPELLANT’S CLAIM THAT THE OHIO LOTTERY COMMISSION WRONGFULLY DISCHARGED HIM IN VIOALTION OF ANTI-DISCRIMINATION LAWS AND THE FREE SPEECH PUBLIC POLICY RIGHT FOUND IN THE OHIO AND UNITED STATES CONSTITUTIONS.”

¶{7} The trial court granted OLC’s Civ.R. 12(B)(1) motion to dismiss finding that it lacked subject matter jurisdiction over the claims and that the claims were within the exclusive jurisdiction of the Court of Claims. We apply a de novo standard of review when determining whether the trial court’s ruling on a Civ.R. 12(B)(1) motion to dismiss was correct. *Kramer v. Installation Unlimited, Inc.* (2002), 147 Ohio App.3d 350. The question is whether plaintiff alleges any cause of action that the court of common pleas has authority to decide. *Troutman v. Ohio Dept. of Rehab. and Correction*, 10th Dist. No. 03AP-1240, 2005-Ohio-334, citing *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56.

¶{8} The cause of action addressed in this appeal is the third claim in the complaint. It is labeled “VIOLATION OF PUBLIC POLICY/WRONGFUL DISCHARGE” and under this label Green asserts that a clear public policy entitling citizens to engage in free speech is manifested in the United States and Ohio Constitutions. He then

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<sup>1</sup>It is asserted that on the same day of filing the notice of appeal from the trial court’s dismissal of his complaint, that Green filed a complaint in the Court of Claims alleging the same claims that were alleged in the complaint filed with the common pleas court. The complaint filed with the Court of Claims is not a part of record, therefore, that alleged fact can be neither confirmed or denied.

alleges that OLC terminated him for engaging in free speech and political speech during times when he was not working.

¶{9} OLC is a state agency, and generally, sovereign immunity applies to the state. Regarding sovereign immunity and the ability to sue the state, the Ohio Supreme Court has recently explained:

¶{10} “In 1912, Section 16, Article I of the Ohio Constitution, the open courts provision, was amended, and the following language was added:

¶{11} “Suits may be brought against the state, in such courts and in such manner, as may be provided by law.’ ‘This provision was ‘not self-executing,’ and constituted only an authorization for subsequent statutes in which the General Assembly could grant its specific consent to be sued. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 285, citing *Raudabaugh v. State* (1917), 96 Ohio St. 513, 518.

¶{12} “However, in 1975, the ‘General Assembly enacted legislation [the Court of Claims Act, R.C. Chapter 2743] creating the Court of Claims and specifying the forum and manner in which actions may be brought against the state and its officers and employees.’ *Id.* at 286. Under the Court of Claims Act, the state ‘waives its immunity from liability’ and ‘consents to be sued’ in the Court of Claims. R.C. 2743.02(A)(1).” *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, ¶14-16.

¶{13} R.C. 2743.02,<sup>2</sup> the statute discussed in the above quote, which waives the state’s immunity and creates the forum and manner in which actions may be brought against the state and its officers, is titled, “Waiver of immunity of state; personal immunity not available to state; state immunity for performance of public duty; hospitals of political subdivisions; collateral recovery; indemnification of personnel; actions against state personnel; third-party complaints and counterclaims.” Section (A)(1) provides, in pertinent part:

¶{14} “The state hereby waives its immunity from liability \* \* \* and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties,

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<sup>2</sup>Not to be confused with R.C. Chapter 2744 that applies to political subdivisions, not the state.

except that the determination of liability is subject to the limitations set forth in this chapter \* \* \*. To the extent that the state has previously consented to be sued, this chapter has no applicability.” R.C. 2743.02(A)(1).

¶{15} In 1978, the Ohio Supreme Court looked at the language of this statute and explained that “R.C. 2743.02(A) does not create a new right of action against the state, but places the state upon the same level as any private party.” *McCord v. Ohio Div. of Parks & Recreation* (1978), 54 Ohio St.2d 72, 74. In a later case, it further explained that “suits against the state are inherently limited by the type of action asserted against it; if the cause of action is not cognizable as between private parties, then there can likewise be no state liability. For instance, actions \* \* \* that do *not* sound in tort but seek recovery purely for a statutory violation will not necessarily lie against the state-particularly if the statute in question provides no private right of action. Cf. *Smith v. Wait* (1975), 46 Ohio App.2d 281, 283-286, 75 O.O.2d 560, 350 N.E.2d 431 (finding no state liability in an action alleging violations of statutory provisions concerning registration of securities).” *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶37.

¶{16} Thus, as can be seen from the Ohio Supreme Court’s explanation of the language of R.C. 2743.02(A), if the cause of action asserted by Green against OLC, his state employer, is a cause of action that a non-state employee could bring against a non-state employer, then the state waives its immunity and the action is cognizable in the Court of Claims. On the other hand, if Green’s cause of action requires an element of state action, according to the language of R.C. 2743.02(A) and the Ohio Supreme Court’s interpretation of that language, the state did not waive its immunity.

¶{17} The parties, in this case, focus their arguments on whether Green’s wrongful discharge claim based upon the public policy of free speech is a cause of action that could be brought against a private individual. There is case law supporting the conclusion that a wrongful discharge claim based upon the public policy of free speech cannot be brought against a private individual. See *Stephenson v. Yellow Freight System, Inc.* (Oct. 26, 1999), 10th Dist. No. 99AP-77 (dealing with a wrongful discharge claim based on the public policy of free speech), citing *Eastwood Mall, Inc. v. Slanco* (1994), 68 Ohio St.3d 221, 223 (dealing with injunction issued against a

private individual from picketing another private individual's property); *Petrovski v. Federal Express Corp.* (N.D.Ohio 2002), 210 F.Supp.2d 943, 948 (finding that state or federal constitutional free speech cannot, in absence of state action, be the basis for a public policy exception in wrongful discharge claims). Likewise, there is case law that supports the conclusion that it can be brought against a private individual. See *Plona v. U.P.S.* (N.D.Ohio 2007), No. 1:06-CV-01144, 2007 WL 509747 (finding that a wrongful discharge claim based on a public policy in the constitution that typically requires state action would be actionable against a private employer when the alleged violation occurred outside of work. It explained, "Burdens on employees while at work do not jeopardize their rights; they are instead permissible limits on the rights enshrined in the Ohio constitution. \* \* \* On the other hand, punishing employees for exercising constitutional rights while outside the workplace jeopardizes public policy to a much greater degree."). However, this court does not need to determine whether or not the wrongful discharge claim based upon the public policy of free speech can be brought against a private individual, because regardless of that determination, it is clear the common pleas court does not have jurisdiction.

¶{18} The Ohio Supreme Court has explained:

¶{19} "It is well-settled law that a state is not subject to suit in its own courts unless it expressly consents to be sued. See *Manning v. Ohio State Library Bd.* (1991), 62 Ohio St.3d 24, 29-30. In 1912, the Ohio Constitution was amended to provide that '[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law.' Section 16, Article I, Ohio Constitution.

¶{20} "However, this provision did not provide specific consent for every state entity to be sued in every state court. See *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 285, 595 N.E.2d 862, citing *Raudabaugh v. State* (1917), 96 Ohio St. 513, 518, 118 N.E. 102. Rather, it merely enabled the state to pass statutes consenting to be sued in specific ways; unless an explicit statutory waiver exists, the presumption of sovereign immunity applies. See *id.*" *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶7-8.

¶{21} As aforementioned, R.C. 2743.02 provides the manner and forum in which the state can be sued. As to the forum, that statute, as quoted and explained

above, expressly provides that the state consented to be sued in the Court of Claims. R.C. 2743.02(A)(1). See, *Wallace*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶37. The statute does not provide that the state consented to be sued in any other court. Thus, by the clear language of the statute, the common pleas court is without jurisdiction to hear actions asserted against the state.

¶{22} That said, it is acknowledged that in addition to dictating the forum in which a suit can be brought, the state also only waived its immunity to causes of action that are cognizable between private parties. *Wallace*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶37. Whether or not the claim asserted here is one that can be brought against a private individual is best left to the determination of the Court of Claims, which, as the designated forum to sue the state, is in the best position to determine whether the state waived its immunity. We will not render a determination on that issue.

¶{23} For the foregoing reasons, pursuant to R.C. 2743.02(A), suits against the state must be brought in the Court of Claims and, thus, the trial court did not commit error in granting the motion to dismiss. Consequently, the judgment of the trial court to dismiss the cause of action for lack of jurisdiction is hereby affirmed, albeit on other grounds.

Donofrio, J., concurs.

Waite, J., concurs.