

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Attorneys for Defendants

**Re: Najid Hussain v. Delaware Department of Natural
Resources and Environmental Control, Joseph M.
Martini, James D. Werner, and John A. Hughes
C.A. No. 08C-01-334 RRC**

Submitted: July 21, 2008
Decided: October 17, 2008

On Defendants' Motion to Dismiss.
GRANTED.

Dear Dr. Hussain, Mr. Slattery and Mr. Phillips:

In this action, Plaintiff alleges that he suffered damages as a result of the statements and actions of his supervisor and administrators in connection with Plaintiff's termination in February, 2006 as a "Program Manager I" from the Department of Environmental Control and Natural Resources ("DNREC"). Shortly after Plaintiff's termination, he filed a grievance with the Human Resource Management section of DNREC.

Plaintiff appealed the hearing officer's decision to the Merit Employee Relations Board ("the MERB"), which dismissed Plaintiff's grievance.

In Plaintiff's complaint filed January 31, 2008 in this Court, Plaintiff asserts three causes of action against DNREC, Joseph Martini, James Werner, and John Hughes: 1) "Creating unreasonable performance expectations via excessive salary advance," 2) "Falsification of Service Record in Violation of Public Policy," and 3) "Intentional Infliction of Emotional Distress."¹ Defendants have filed a motion to dismiss the action, arguing several grounds, but relying essentially on a claim of lack of subject matter jurisdiction and collateral estoppel, asserting that Delaware law requires that Plaintiff's remedy was to have appealed the May 21, 2008 decision of the MERB to this Court, pursuant to 29 *Del. C.* § 5949(b).

For the reasons discussed below, Defendants' Motion to Dismiss is granted, as this Court lacks subject matter jurisdiction over Plaintiff's purported causes of action and Plaintiff is otherwise collaterally estopped from pursuing this claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

Najid Hussain was formerly employed in a probationary position as a Program Manager I in the Air Quality Management Group in the DNREC, an executive branch agency of the State of Delaware. Defendants are the State agency that formerly employed Plaintiff as well as two administrators employed by the DNREC and Plaintiff's immediate supervisor.

Plaintiff was terminated from his probationary position with DNREC on or about February 3, 2006 due to what Defendants assert was unsatisfactory work performance. Plaintiff filed a grievance contesting his termination on or about February 14, 2006 with both the Human Resource Management section of DNREC and the MERB. Plaintiff alleged that his termination was the result of "salary envy" in violation of Merit Rule 2.1. The grievance was initially heard by a Human Resource Management hearing officer on April 11, 2006. Following a decision dated April 19, 2006 denying his grievance, Plaintiff further pursued his pending grievance before the MERB. In all the proceedings before the MERB Plaintiff was represented by legal counsel. Plaintiff is representing himself in this litigation.

The MERB conducted evidentiary hearings on September 21, 2006, January 18, 2007, June 21, 2007, August 27, 2007, and November 7,

¹ Compl., Docket Item ("D.I.") 1 at 7-11.

2007. On the last day of hearings the MERB dismissed Plaintiff's grievance by oral vote. The MERB's written decision, issued on May 21, 2008, in part found:

Appellant did not sustain his burden of showing that salary envy was the reason for his termination. Instead, the preponderance of the evidence established that the basis for his termination was his overall performance as a manager which the employer found unsatisfactory. The testimony clearly established that Appellant's staff and ultimately Appellant's supervisor lost confidence and a sense of trust in Appellant that was critical to his role as a manager. The Board finds that the performance factors discussed above are all merit factors, as opposed to non-merit factors, and they formed a reasonable basis for the determination that Appellant's performance during the probationary period had been unsatisfactory.²

Prior to the issuance of the MERB's written decision, Plaintiff instituted the instant action on January 31, 2008. Defendants then filed their motion to dismiss. During oral argument on June 27, 2008 for Defendants' motion to dismiss, Plaintiff proffered six documents: 1) termination letter from Secretary Hughes, 2) employee performance review for 2/21/05 – 12/31/05, 3) letter to "Ali" from "Najid," 4) email to John Hughes from Najid Hussain, 5) memo to Jim Werner from Joseph M. Martini, and 6) email to Susan Sprinkle from Najid Hussain.

II. CONTENTIONS OF THE PARTIES

Defendants' Motion to Dismiss sets forth eight grounds for dismissal of Plaintiff's suit.

Defendants' first and primary contention is that this court lacks jurisdiction over the subject matter of this action, because Plaintiff's "exclusive remedy," has, in fact, been pursued in accordance with 29 *Del. C.* § 5943(a), which states,

[t]he exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Director's

² *In the Matter of Appellant v. Dept. of Nat. Resources and Env'tl. Control*, MERB Appeal No. 06-02-349, at 11 (May 21, 2008) (Redacted Opinion).

regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules.

In addition, pursuant to 29 *Del. C.* § 5943(b), “[i]f the Board upholds the decision of the appointing authority, the employee shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law.” Plaintiff did not appeal the MERB decision to this Court.

Second, Defendants contend that the doctrine of collateral estoppel precludes relitigation in this court. Defendants maintain that the primary issue underlying both the MERB appeal and the present cause of action are the same: was there a legitimate, merit-based reason for terminating the plaintiff’s probationary employment?³

In response, Plaintiff first contends that “defamation” was not pursued as a claim in Plaintiff’s grievance before the MERB; consequently, Plaintiff contends that this court has jurisdiction to hear that claim.⁴

Second, Plaintiff contends that the issue of defamation was not litigated before the MERB; therefore, the doctrine of collateral estoppel does not preclude this suit.⁵

³ Because this Court holds that Plaintiff’s claim is barred due to lack of subject matter jurisdiction and collateral estoppel, the Court need not reach Defendants’ other contentions, which are: 1) Plaintiff’s claim is barred by the doctrine of *res judicata*; 2) Plaintiff’s claim is barred by the doctrine of sovereign immunity; 3) the Defendants are immune from suit pursuant to the State Tort Claims Act, 10 *Del. C.* § 4001; 4) Plaintiff’s claim is barred by the employment-at-will doctrine; 5) the complaint fails to state a legal claim for which relief may be granted; 6) the complaint fails for insufficiency of process; and 7) the complaint fails for insufficiency of service of process.

⁴ Assuming without deciding that Plaintiff correctly plead a defamation action, the Court need not reach this issue because the Court lacks subject matter jurisdiction and Plaintiff is collaterally estopped from pursuing his claim in this Court. Plaintiff’s alleged defamation is inextricably linked to Plaintiff’s termination and thus he does not have an independent cause of action this Court may hear. *See Kopicko v. State of Delaware Dep’t of Serv. For Children, Youth and their Families*, 2004 WL 1427077, *1 (Del.) (noting “the critical issue of fact that underlies her breach of contract action in the Superior Court (the subject of this appeal) is the same fact issue that underlies her Merit System grievance, specifically, whether Kopicko was terminated for a performance or merits-based reason.”).

⁵ In response to the Defendants’ other contentions, which the Court does not reach, Plaintiff maintains: 1) defamation was not litigated before the MERB, thus the doctrine

III. STANDARD OF REVIEW

When deciding a motion to dismiss, “all factual allegations of the complaint are accepted as true.”⁶ A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) “unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief.”⁷ Therefore, the Court must determine “whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”⁸

of *res judicata* does not preclude suit; 2) this court should recognize the “litigation exception” to the doctrine of sovereign immunity because “the defendants’ wanton negligence and deliberate distortions have damaged the good standing and reputation of the plaintiff;” 3) the State Tort Claims Act does not protect employees’ civil liability in cases, such as Plaintiff’s, where the omission complained of was done with “gross or wanton” negligence; 4) the doctrine of employment-at-will does not apply when there is “deliberate infliction of injuries to the employee being terminated;” 5) Plaintiff concedes that an at-will employee “can be terminated at any time for no reason,” but nonetheless contends “the employer has no right to ruin the employee’s good name and reputation as an excuse, or side-effect, for termination;” 6) “the complaint is specific about the charges and relief requested;” and 7) in repetition of Plaintiff’s above contention, “the complaint is specific about the charges and relief requested.”

⁶ *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff’d* 297 A.2d 37 (Del. 1972).

⁷ *Id.*

⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). The attachment of the May 21, 2008 MERB decision to Defendants’ Memorandum and Reply in Support of State Defendants’ Motion to Dismiss and the various documents proffered by Dr. Hussain at oral argument does not require the conversion of the Defendants’ Motion to Dismiss into a Motion for Summary Judgment, despite Plaintiff’s stated desire to conduct discovery. *See* Super. Ct. Civil R. 12(b); Super. Ct. Civil R. 56. In this connection, the Court considers “whether the material submitted require conversion,” and, if the Court elects to convert, “whether the parties had adequate notice of the court’s intention to convert.” *Appriva Shareholder Litigation Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1286 (Del. 2007).

Conversion to summary judgment is not required if the documents are “integral to a plaintiff’s claim and incorporated into the complaint.” *In re Santa Fe Pac. Corp. Shareholder Litigation*, 669 A.2d 59, 70 (Del. 1995). Thus, the Court may consider Plaintiff’s termination letter, to which Defendants do not object. In addition, a court can consider documents outside the pleadings when “the documents are the very documents that are alleged to contain the various misrepresentations or omissions and are relevant

IV. DISCUSSION

The chief issues raised are whether this Court has subject matter jurisdiction and if Plaintiff is otherwise collaterally estopped from pursuing his claims, which are all stem from his termination.

Plaintiff was terminated from his probationary position with DNREC on or about February 3, 2006 due to alleged unsatisfactory work performance. According to 29 *Del. C.* § 5943(a), “the exclusive remedy available to a classified employee . . . is to file a grievance in accordance with the procedures stated in the merit rules.”

Plaintiff filed a grievance contesting his termination on or about February 14, 2006 with both the Human Resource Management section and the MERB. The grievance was initially heard by a Human Resource Management hearing officer on April 11, 2006. Following a decision dated April 19, 2006 denying his grievance, Plaintiff further pursued his pending grievance before the MERB and was represented by legal counsel.

In his appeal to the MERB, Plaintiff alleged discrimination in violation of Merit Rule 2.1, including Plaintiff’s theory of “salary envy.” The MERB conducted four days of hearings. A written decision of the MERB rejected Plaintiff’s claims and dismissed his appeal. While 29 *Del.*

not to prove the truth of their contents, but only to determine what the documents stated . . .” *Id.* at 69. A document may also be used to “establish formal uncontested matters.” *Highland Capital Management, LP v. T.C. Group, LLC*, 2006 WL 2128677 (Del. Super. 2006). As Defendants note, “[w]ithout the MERB decision to review, the court cannot make a determination as to whether it has subject matter jurisdiction in this case or determine whether Dr. Hussain is collaterally estopped from pursuing his present litigation.” Defs. “Letter Mem. in Resp. to the Court’s Question Posed at Oral Argument on June 27, 2008,” D.I. 13 at 2. Therefore, this Court may consider the MERB decision attached to Defendants’ Reply in Support of their Motion to Dismiss. (The MERB decision had not been issued at the time Defendants filed their Motion to Dismiss). However, with the exception of Plaintiff’s termination letter, the Court does not consider the documents submitted by Plaintiff to the Court during oral argument, including 1) employee performance review for 2/21/05 – 12/31/05, 2) letter to “Ali” from “Najid,” 3) email to John Hughes from Najid Hussain, 4) memo to Jim Werner from Joseph M. Martini, and 5) email to Susan Sprinkle from Najid Hussain. Plaintiff did not include these documents in his Response, but only offered them to the Court during oral argument. The act of proffering documents to the court that were not attached to any motion does not convert a motion to dismiss to a motion for summary judgment. *See Capaldi v. Richards*, 2006 WL 3742603, *2 (Del.Ch.) (holding that the inclusion of other filings in a related matter does not convert a motion to dismiss into a motion for summary judgment).

C. § 5949(b) provides an employee with the right to appeal the MERB's decision to the Superior Court, Plaintiff failed to do so.

The Delaware Supreme Court's decision in *Kopicko v. State of Delaware, Department of Services for Children, Youth and their Families*, holding that 1) the Superior Court lacked subject matter jurisdiction over the employee's work-related claim and 2) the action was barred by operation of collateral estoppel, is instructive.⁹ *Kopicko* also involved a State employee who was terminated during the probationary period. The *Kopicko* employee sued her employer in Superior Court for breach of implied covenant of good faith and fair dealing. The Superior Court granted summary judgment to *Kopicko's* employer on the basis that sovereign immunity operated as an absolute bar to *Kopicko's* claim. *Kopicko* appealed, and the Supreme Court stayed all proceedings to allow *Kopicko* the opportunity to exhaust her administrative remedies, namely, an appeal to the MERB.

The MERB in *Kopicko* then determined that the reasons for the plaintiff's termination were merit-related and that the plaintiff's performance during the probationary period had been unsatisfactory. The Superior Court affirmed the MERB's decision, as did the Supreme Court. Following the issuance of a Notice to Show Cause why *Kopicko's* first appeal to the Supreme Court should not be dismissed, *Kopicko* contended that her appeal alleged a different cause of action than her MERB grievance. However, in ultimately dismissing *Kopicko's* appeal, the Supreme Court found that *Kopicko's* action was barred for two reasons: 1) the Superior Court had no subject matter jurisdiction over the claim and 2) the action was barred by operation of collateral estoppel.¹⁰

Therefore, in light of the Delaware Supreme Court's ruling in *Kopicko*, this Court concludes that it does not have subject matter jurisdiction to hear Plaintiff's claim. Pursuant to 29 *Del. C.* § 5949(b), an employee's exclusive remedy is to appeal the MERB decision to the Superior Court "on the question of whether the appointing authority acted in accordance with law."

In addition, Plaintiff is collaterally estopped from pursuing his claims. The Delaware Supreme Court has explained that "the test for applying collateral estoppel requires that (1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final

⁹ *Kopicko v. State of Delaware Dep't of Serv. For Children, Youth and their Families*, 2004 WL 1427077, *1 (Del.).

¹⁰ *Id.*

judgment.”¹¹ As in *Kopicko*, the primary issue underlying Plaintiff’s appeal to the MERB and Plaintiff’s present cause of action are, essentially, one and the same. While the Plaintiff now attempts to characterize his present action as one sounding in defamation, the allegations in the complaint are essentially identical to those alleged before the MERB. After four days of hearings, during which Plaintiff was represented by counsel, the MERB found:

Appellant did not sustain his burden of showing that salary envy was the reason for his termination. Instead, the preponderance of the evidence established that the basis for his termination was his overall performance as a manager which the employer found unsatisfactory. The testimony clearly established that Appellant’s staff and ultimately Appellant’s supervisor lost confidence and a sense of trust in Appellant that was critical to his role as a manager. The Board finds that the performance factors discussed above are all merit factors as opposed to non-merit factors and they formed a reasonable basis for the determination that Appellant’s performance during the probationary period had been unsatisfactory.¹²

The critical facts and legal theories that Plaintiff raises in this action are the same as those already addressed and ruled on by the MERB. Therefore, Plaintiff is collaterally estopped from relitigating in this Court.¹³

¹¹ *HealthTrio, Inc. v. Margules*, 2007 WL 544156, *9 (Del.Super.) (citing *HTaylor v. State*, 402 A.2d 373 (Del. 1979)H).

¹² *In the Matter of Appellant v. Dept. of Nat. Resources and Envntl. Control*, MERB Appeal No. 06-02-349, at 11 (May 21, 2008) (Redacted Opinion).

¹³ Because the Court finds that it lacks subject matter jurisdiction and Plaintiff is collaterally estopped, the Court need not reach the other issues.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED.**

cc: Prothonotary
Merit Employee Relations Board