IN THE COURT OF CLAIMS OF OHIO

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TERRI GARKO	:	
Plaintiff,	:	Case No. 2020-00369JD
-vs-	:	Judge Patrick McGrath
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION,	:	Magistrate Holly True Shaver
Defendant.	:	

MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S STATE AND FEDERAL CONSTITUTIONAL CLAIMS AND PUNITIVE DAMAGES CLAIMS

Now comes the Defendant, Ohio Department of Rehabilitation and Correction ("DRC"), and moves this Court to dismiss Plaintiff's state and federal constitutional claims for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1). Defendant also moves this court to dismiss Plaintiff's claim for punitive damages for failure to state a claim pursuant to Civ.R. 12(B)(6). The basis of this Motion is more fully set forth in the Memorandum in Support, which is attached hereto and incorporated herein.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Velda K. Hofacker; /s/ Lauren D. Emery

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MEMORANDUM IN SUPPORT

I. Introduction

Plaintiff Terri Garko alleges that DRC's conduct constituted excessive force and cruel and unusual punishment in violation of the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution. (Compl. ¶27) She also alleges that DRC's "denial of publications and books violated Article I Section 11 of the Constitution of the State of Ohio and the First Amendment to the Constitution of the United States of America." (Compl. 25) However, it is well-settled that the Court of Claims has no subject matter jurisdiction over such claims. Moreover, Plaintiff seeks the recovery of punitive damages "in excess of $25,000." It is also well-established that a Plaintiff is not entitled to recover punitive damages against the State. Accordingly, these claims should be dismissed.

II. Plaintiff's Constitutional Claims Should Be Dismissed

a. Standard of Review

The standard of review for a dismissal pursuant to Civ.R. 12(B)(l) is whether any cause of action "cognizable by the forum" has been raised in the Complaint. *State ex rel.*

Bush, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). Even if all of her allegations are accepted as true, Plaintiff's claims under the First, Fourth, Eighth, and Fourteenth Amendments to the United States and/or Ohio Constitutions must fail for a lack of jurisdiction.

b. This Court lacks jurisdiction over constitutional claims.

The Court of Claims lacks subject matter jurisdiction over claims involving constitutional and civil rights. Actions in the Court of Claims are limited to those that could be brought against private parties. *Bleicher v. University of Cincinnati College of Medicine,* 78 Ohio App.3d 302, 307, 604 N.E.2d 783 (10th Dist. 1992); *Burkey v. Southern Ohio Correctional Facility,* 38 Ohio App.3d 170, 171, 528 N.E.2d 607 (10th Dist. 1988). Constitutional violations require an element of state action and therefore cannot be brought against a private individual. *Bleicher,* 78 Ohio App. 3d at 307; *Burkey,* 38 Ohio App.3d at 171. Thus, constitutional claims "present no viable cause of action to be heard in the Court of Claims." *Bleicher,* 78 Ohio App. 3d at 307. Accordingly, this Court should dismiss Plaintiff's claims for violating her First, Fourth, Eighth, and Fourteenth Amendment rights which she brings pursuant to 42 U.S.C. 1983, as well as her state Constitutional claims, for lack of subject matter jurisdiction.

III. Plaintiff's Punitive Damages Claim Should Be Dismissed

a. Standard of Review

Dismissal of a claim for failure to state a claim upon which relief may be granted is appropriate where it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *York v. Ohio State Highway Patrol,* 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991); *O'Brien v. Univ. Community*

Tenants Union, Inc., 42 Ohio St.2d 242, 327 N.E. 2d 753 (1975). In construing a complaint pursuant to Civ.R. 12(B)(6), the court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

b. Punitive damages may not be awarded against the State.

In her prayer for relief, Plaintiff seeks the recovery of punitive damages "in excess of $25,000." However, punitive damages are not recoverable from a state entity like DRC. *See Drain v. Kosydar*, 54 Ohio St.2d 49, 55-56, 374 N.E.2d 1253 (1978). The Ohio Supreme Court reasoned that a state entity can only act through its employees. *Id.* at 56. If the employee's actions would typically support an award of punitive damages—for example because they "exhibited a willful or wanton disregard for the health, safety and welfare of the general public"—those actions would be outside the scope of state employment, and liability would not be imputed to the state. *Id.* Therefore, Plaintiff's claim for punitive damages should be dismissed.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Velda K. Hofacker; /s/ Lauren D. Emery

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attachment C (2)

my own attorney
who I paid
and he stole
He DID This
To me He knew
what he was
Doing.
he protected
them. while I suffered
in pain
going blind