IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMIN S. HASSAN,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-3863
VETERANS ADMINISTRATION, et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JANUARY 4, 2005**

Amin S. Hassan ("Hassan") filed a Complaint alleging violations of 42 U.S.C. §§ 1981, 1983 and breach of contract against the Veterans Administration ("VA"), the Veterans Administration Medical Regional Office ("Regional Office"), Clarence Baker ("Baker") and Lori Barbanell ("Barbanell")(collectively referred to as "the Government"). Hassan alleges that the Government unlawfully terminated his employment based upon his race, gender and religion.[1] Hassan also alleges that the Government breached its contract of employment by refusing to provide him with a pre-termination hearing. Presently before this Court is the Motion to Dismiss the Complaint filed by the Government and Hassan's Response. For the reasons discussed below, the Government's Motion to Dismiss will be granted.

I. BACKGROUND

Hassan was employed as a warehouseman by the Veterans of Foreign Affairs ("VFA") for approximately nineteen years. Hassan, while under the supervision of Baker, was

[1] Hassan is a black male and is a member of the Islamic religion.

accused of leaving the "station" for one half day. Hassan states that he sent an e-mail to Baker seeking permission to leave and visit his doctor. After this occurrence, Baker presented Hassan with a "last chance agreement." The "last chance agreement" states, *inter alia*, that a proposed removal of Hassan from employment would be held in abeyance subject to Hassan's compliance with the agreement for a period of two years; that Hassan must be regular in attendance and follow proper leave requesting procures; that the parties have read the agreement, understand its terms, and enter into it knowingly and voluntarily; and Hassan agreed to waive his right of appeal to the Merit Systems Protection Board ("MSPB") for any action resulting from his noncompliance with the agreement.[2] (U.S. MSPB Northeastern Reg'l Office Mem. Op. at 2-3). Hassan signed the "last chance agreement" on October 10, 2001. (Id. at 2).

Hassan, who is a black belt Karate expert, was inducted into the Karate Hall of Fame, under the World Marshall Arts League, in Frankfurt, Germany. The induction was scheduled to occur on June 14, 2002 (during Hassan's "last chance agreement" probationary period). Hassan sought time off from his employment in order to attend the induction and notified Baker. Hassan was given permission and procured travel arrangements which scheduled his departure flight for Germany on June 13, 2002 from John F. Kennedy International Airport

---

[2] The MSPB "was created as a direct result of efforts to reform the political spoils system under which Federal employees were routinely fired when a new administration assumed power." Sloan v. West, 140 F.3d 1255, 1258 (9th Cir. 1998). "After several antecedents, in 1978 Congress passed the Civil Service Reform Act, 5 U.S.C. § 1201 *et. seq.*, with the hope of simplifying and revising the rules and regulations governing federal employees." Id. (footnote omitted). "The Act created the Merit Systems Protection Board as a quasi-judicial Government agency to adjudicate Federal employee appeals of agency personnel actions." Id. at 1258-59 (citing 5 U.S.C. § 1201 *et. seq.*; 5 C.F.R. § 1200.1). "The MSPB is charged with overseeing and protecting the merit system, and adjudicating conflicts between Federal employees and employers." Id. at 1259.

("JFK") in New York. It was planned that Hassan's wife would drive him to JFK, however, that did not occur. A few days prior to his trip, Hassan's van was shot full of holes resulting from a gunfight that occurred outside of his house. Hassan's van was left inoperable and was taken into evidence by the Wilmington, Delaware Police Department. Consequently, Hassan had to use public transportation to travel to JFK.

On June 13, 2002, Hassan called into work at 7:15 a.m. to explain his situation. Hassan left a message seeking permission to leave earlier that day so that he could commute to JFK by public transportation rather than private transportation. Hassan continued to call. At approximately 7:30 a.m., Hassan spoke with Toni Wilson, a purchasing clerk, who informed him that Baker was in the facility and she would give him Hassan's message. Hassan then left a message with the answering service used by Baker. Hassan also telephoned Barbarnell and left a message explaining the situation. Barbarnell returned Hassan's call and informed him that she and Baker had decided that he had to come into work because two other workers had already been excused for the afternoon. Hassan informed both Baker and Barbarnell that he was applying for an emergency leave because he had to be on the train in the afternoon in order to arrive at JFK for his flight to Germany.

Hassan left for Germany using his purchased ticket and, upon his return, Baker informed Hassan that he had been cited for his absence.[3] Baker also cited Hassan for a violation of the "last chance agreement." On July 20, 2002, Hassan was informed that his position at the VFA warehouse was being terminated and that he would have an opportunity to appeal the termination decision to his employer. Additionally, Hassan was supposedly informed that the

[3] On June 13, 2002, Baker closed the warehouse apparently due to employee absences.

decision was subject to reconsideration at the time of a hearing which he could request pursuant to the "last chance agreement." Hassan notified his employer of his request for reconsideration of the decision made by Baker. On August 22, 2002, Hassan's employer designated an attorney to represent him during the review period. Hassan filed for reconsideration and requested a hearing on the issues. On November 26, 2002, Hassan was informed that the decision regarding his termination was not going to be reviewed and that his request for a hearing was denied.[4] Hassan was then informed that he was permanently terminated on the basis that he had violated the "last chance agreement." Hassan attempted to seek administrative review, but was denied review in March 2004. Hassan was informed that his employment was terminated without a hearing.

Hassan alleges that as a result of the aforementioned, he was refused reinstatement as provided by the provisions of his employment. Hassan also claims that he was denied the right to present his claim for reinstatement to a review board. Hassan asserts that he has suffered a loss of income and has further been denied the benefits which were part of the employment package that was part of the compensation owed to him. Hassan additionally claims that the loss of employment has resulted in emotional stress due to his failure to earn sufficient funds to provide for his family. On August 13, 2004, Hassan filed the instant two-count Complaint alleging the following: violations of 42 U.S.C. §§ 1981 and 1983 (Count I) and breach of

[4] Hassan alleges that he felt compelled to enter into the "last chance agreement" and that his understanding was that if another allegation of a violation of his employment terms was charged, he would be given an opportunity to present his response before a hearing officer. According to Hassan, if he had been informed that he would lose his right to a hearing, he would have made the effort to present his position to a hearing officer. Thus, Hassan alleges that the denial of a hearing effectively breaches the "last chance agreement" that he was induced to enter into by the Defendants.

employment contract (Count II).[5]

II. STANDARDS

A. 12 (b)(6) - Failure to State a Claim Upon Which Relief Could be Granted

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12 (b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a motion to dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

B. 12 (b)(1) - Lack of Subject Matter Jurisdiction

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In the instant action, the Government makes a factual challenge to the existence of subject matter jurisdiction. "[W]hen the motion attacks the existence of subject matter jurisdiction in fact, no presumptive truthfulness attaches to plaintiff's allegations and the Court may weigh the evidence to satisfy itself that

---

[5] Regarding his claims under 42 U.S.C. §§ 1981 and 1983, Hassan concedes that there is no personal liability concerning the individual Defendants, Baker and Barbanell. (Pl.'s Resp. Gov.'s Mot. to Dismiss at 6-7). Thus, Hassan is suing Baker and Barbanell solely in their official capacities. The Government has specified that it only represents Baker and Barbanell in their official capacities. (Gov.'s Mem. Law Supp. Mot. to Dismiss at 1 n.1). Regarding the breach of contract claim, Hassan appears to assert that claim solely against the VA and/or the Regional Office, and does not assert the claim against Baker or Barbanell.

subject matter jurisdiction exists in fact." Orelski v. Pearson, 337 F. Supp. 2d 695, 697 (W.D. Pa. 2004)(citing Mortensen, 549 F.2d at 891; Carpet Group Int'l v. Oriental Rug Imp. Ass'n, Inc., 227 F.3d 62, 69 (3rd Cir. 2000); Poling v. K. Hovnanian Enters., 99 F. Supp. 2d 502, 515 (D.N.J. 2000)). The plaintiff bears the burden of proof that jurisdiction does in fact exist. Id. (quoting Mortensen, 549 F.2d at 891).

II. DISCUSSION

A. Count I - 42 U.S.C. §§ 1981 and 1983

In Count I, entitled "Discharge in Violation of the Civil Rights Act," Hassan alleges that the Government's action of depriving him of his employment based upon his race, gender and religion was a violation of his civil rights. "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is 'an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.'" Collins v. Sec'y of Veterans Affairs, 257 F. Supp. 2d 812, 817 (E.D. Pa. 2003)(quoting Brown v. GSA, 425 U.S. 802, 828 (1976)). Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a)(1). Title VII "establishes the exclusive remedy for federal employees who allege discrimination in the workplace." Robinson v. Dalton, 107 F.3d 1018, 1020-21 (3d Cir. 1997).

Hassan argues that Title VII does not apply to this action. Without citing to any pertinent law, Hassan alleges his employment discrimination claims against the Government asserted pursuant to Section 1981 and Section 1983 are proper. Review of Hassan's claims reveals that he is asserting a straightforward employment discrimination suit against the

Government. Hassan's claims under Section 1981 and Section 1983 are not independent from claims that are appropriately asserted pursuant to Title VII. That is, there are no allegations of any violations of a distinct constitutional right or a federal statutory right other than the alleged violation of rights created by Title VII. Since Hassan is a federal employee who is alleging a straightforward claim of discrimination in the workplace, his claims under Section 1981 and Section 1983 are dismissed because Title VII provides the exclusive remedy.[6] See Crumpton v. Potter, 305 F. Supp. 2d 465, 468 n.4 (E.D. Pa. 2004)(declining to address *pro se* plaintiff's claim under Section 1981 against the Postmaster General of the United States Postal Service because "Title VII is the sole remedy for federal employees alleging employment discrimination claims"); Phillips v. Dalton, No. 94-4828, 1997 WL 24846, at *2 n.4 (E.D. Pa. Jan. 22, 1997)(disposing of plaintiff's employment discrimination claim against the Secretary of the United States Navy by finding that "Title VII is the exclusive remedy for federal employees alleging employment discrimination. Therefore, plaintiff cannot maintain an employment discrimination claim under Section 1981"); see also Washington v. Dep't of Veterans Affairs, No. 98-606, 1998 WL 754464, at *3 (E.D. Pa. Oct. 28, 1998)("Generally, Title VII is the only federal remedy available to a federal employee who claims to have been discriminated against in employment. . . . [However,] a Title VII claim [may] be brought in conjunction with a 1983 claim if there is a

[6] Hassan states that Title VII does not apply to his action. However, if Hassan attempted to assert a claim under Title VII, it would be dismissed pursuant to Federal Rule of Civil Procedure 12 (b)(6) for failure to properly exhaust administrative remedies. See Burrell v. United States Postal Serv., 164 F. Supp. 2d 805, 809-813 (E.D. La. Apr. 16, 2001); Nater v. Riley, 114 F. Supp. 2d 17, 23-26 (D.P.R. 2000); Khanania v. Sec'y of Transp., No. 03-1065, 2003 WL 22134855, at *1-4 (N.D. Ca. Sept. 5, 2003); Laube v. Sec'y of the Air Force, No. 99-1325, 1999 WL 305520, at *2-4 (E.D. Pa. May 12, 1999); New v. Brown, No. 97-125, 1997 WL 666173, at * 3-4 (E.D. Pa. Oct. 21, 1997).

constitutional right, separate from the rights created by Title VII, which serves as the basis for the 1983 claim.").

B. Count II - Breach of Employment Contract

In Count II, entitled "Breach of Contract of Employment," Hassan claims that the Government breached its employment contract by terminating his employment without a hearing. Regarding this claim, Hassan alleges that he is entitled to damages "in excess of $50,000." (Compl., ¶18). Relying upon the Tucker Act, 28 U.S.C. §§ 1346 and 1491, the Government asserts that this Court lacks subject matter jurisdiction over this claim.[7] "The Tucker Act creates no substantive right of recovery; rather it waives sovereign immunity and defines the limits of federal jurisdiction in actions against the United States for non-tort money damages." Saraco v. Hallett, 831 F. Supp. 1154, 1159 (E.D. Pa. 1993), *aff'd*, 61 F.3d 863 (Fed. Cir. 1995). Section 1346, known as the Little Tucker Act, states in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States [Court of Federal Claims], of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. (quoting 28 U.S.C. § 1346(a)); see also Chabal v. Reagan, 822 F.2d 349, 353 (3d Cir. 1987)("Under the Tucker Act, the United States Claims Court and district courts share original jurisdiction over non-tort monetary claims against the United States not exceeding $10,000.").

Section 1491, referred to as the Big Tucker Act, states in pertinent part:

---

[7] Hassan does not respond to the Government's argument that this Court lacks subject matter jurisdiction over Count II pursuant to the Tucker Act.

> The United States [Court of Federal Claims] shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. (quoting 28 U.S.C. § 1491(a)(1)); see also Zellous v. Broadhead Assocs., 906 F.2d 94, 96 n.3 (3d Cir. 1990)("The United States Claims Court has exclusive original jurisdiction over nontort money damage claims that exceed $10,000."). "Pursuant to the Tucker Act, therefore, the Court of Federal Claims is empowered with jurisdiction over non-tort claims against the United States." Rodriguez v. F.B.I., 876 F. Supp. 706, 709 (E.D. Pa. 1995). "The Court of Federal Claims's jurisdiction is concurrent with that of the district courts for claims under $10,000." Id. "For claims in which more than $10,000 is at issue, however, courts have interpreted the Tucker Act to provide for the exclusive jurisdiction of the Court of Federal Claims." Id. (citations omitted).

Hassan's claim in Count II falls within the scope of the Tucker Act because it is a contract claim for non-tort money damages against the United States. Pursuant to the Tucker Act, this Court lacks jurisdiction over Hassan's breach of employment contract against the Government seeking recovery in excess of $50,000. Hassan's claim is within the exclusive jurisdiction of the Court of Federal Claims because it exceeds the scope of the Little Tucker Act. Thus, the Tucker Act does not confer jurisdiction upon this Court. As a result, Count II is dismissed pursuant to Federal Rule of Civil Procedure 12 (b)(1) for lack of subject matter jurisdiction.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMIN S. HASSAN,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-3863
VETERANS ADMINISTRATION, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 4th day of January, 2005, upon consideration of the Motion to Dismiss the Complaint filed by the Veterans Administration, the Veterans Administration Medical Regional Office, Clarence Baker and Lori Barbanell (Doc. No. 4), and Amin S. Hassan's Response thereto, it is hereby **ORDERED** that:

1. the Motion is **GRANTED;**
2. Hassan's Complaint is**DISMISSED** ;
3. the Clerk of Court shall mark this action **CLOSED**; and
4. Hassan's request for oral argument is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly, Sr. J.