

Case No. 1:11-CV-23
Gwin, J.

violation of [Ohio Revised Code § 4112.14](#) (Count I); (2) Vitran terminated his employment in violation of public policy as expressed by the Ohio Constitution and [Ohio Administrative Code §§ 123:7-1-02](#) and [123:7-1-04](#) (Count II); and (3) that Vitran breached a purported employment contract based upon its Associate Handbook (Count III). [[Doc. 1-1.](#)]

A motion to dismiss pursuant to Rule 12(b)(1) may either attack the claim of jurisdiction on its face or it can attack the factual basis of jurisdiction. [Golden v. Gorno Bros., Inc., 410 F.3d 879, 881 \(6th Cir. 2005\)](#). When a defendant challenges subject matter jurisdiction under 12(b)(1), the plaintiff bears the burden of establishing that the Court has subject matter jurisdiction over his claim. [Hedgepeth v. Tennessee, 215 F.3d 608, 611 \(6th Cir. 2000\)](#).

Defendant says that the National Labor Relations Board has exclusive jurisdiction over the claims asserted in Count II, even if the underlying factual allegations were true. [[Doc. 8-1 at 4.](#)] Plaintiff gives no opposition. Accordingly, because the Defendant presents a colorable challenge to the Court's subject matter jurisdiction and the Plaintiff has not met his burden of proving jurisdiction, the Court **GRANTS** Defendant's motion to dismiss Count II.^{1/}

IT IS SO ORDERED.

Dated: March 28, 2011

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

^{1/} In making this decision, the Court considered [Carver v. Bunch, 946 F.2d 451, 452 \(6th Cir. 1991\)](#). In *Carver*, the Sixth Circuit held that a district court abused its discretion in dismissing a plaintiff's claims solely because the plaintiff failed to respond to the defendant's motion to dismiss under 12(b)(6). [Id. at 452](#). Here, the Court is dismissing Count II under Rule 12(b)(1), which, unlike 12(b)(6), puts the burden on plaintiff to establish jurisdiction. Plaintiff has not met this burden.