IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
GENERAL DIVISION

JOHN W. HERRING,	:		
Plaintiff,	:	**Case No.**	**11 CVH-02-2439**
v.	:	**Judge:**	**Guy L. Reece, II**
UC EXPRESS, et al.,	:		
Defendants.	:		

DECISION AND ENTRY
GRANTING DEFENDANTS' APRIL 1, 2011
MOTION TO DISMISS

REECE, J.

This matter is before the Court on Defendants Alison M. Day and Walmart Associates, Inc.'s[1] (collectively "the Wal-Mart Defendants") April 1, 2011 Motion to Dismiss. As of the date of this Decision and Entry, said motion remains unopposed.

Plaintiff John W. Herring ("Plaintiff") commenced this action, *pro se*, against the Wal-Mart Defendants and Defendant Director, Ohio Department of Job and Family Services ("ODJFS") on February 23, 2011. The Wal-Mart Defendants argue that Plaintiff's Complaint, other than containing a caption and an introductory sentence, does not contain any written allegations and is devoid of any facts or claims. Therefore, they argue the Court should dismiss this action pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted.

[1] The Wal-Mart Defendants maintain Walmart Associates, Inc. is an incorrectly-named defendant; the properly named party is Wal-Mart Stores East, L.P.

The Wal-Mart Defendants characterize Plaintiff's Complaint as "a cover sheet and a collection of assorted documents – nothing more." (Mtn. to Dismiss, at 2.) The unverified documents, the argument continues, do not constitute a short and plain statement of legal facts and claims, nor do they identify a demand for judgment or any other requested relief. Therefore, the Wal-Mart Defendants argue Plaintiff's Complain fails to satisfy Civ.R. 12(B)(6) and Civ.R. 8(A), and the same should be dismissed. Although the Certificate of Service attached to the Wal-Mart Defendants' motion indicates Plaintiff was served with a copy of the same on April 1, 2011, Plaintiff has not responded to or otherwise opposed the Wal-Mart Defendants' motion.

In assessing the merits of a motion to dismiss pursuant to Civ.R. 12(B)(6), a trial court must presume all factual allegations of the pleading to be true and draw all reasonable inferences derived therefrom in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988); *Bridges v. National Engineering & Contracting Co.*, 49 Ohio St.3d 108, 112, 551 N.E.2d 163 (1990). Therefore, to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the face of the complaint that the plaintiff can prove no set of facts entitling him/her to relief. *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), paragraph one of the syllabus.

When considering a motion to dismiss pursuant to Civ.R. 12(B)(6), a trial court can look only to matters contained in the complaint "or, in a proper case, the copy of a written instrument upon which a claim is predicated, to determine whether the allegations are legally sufficient to state a claim." *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶12, citing *Slife v. Kundtz Properties*, 40 Ohio App.2d 179, 185-186, 318 N.E.2d 557 (1974). See, also, *DVCC, Inc. v. Medical College*, 10th Dist. No. 05AP-237, 2006-

Ohio-945, ¶18. A motion to dismiss is properly granted when the court has accepted all factual allegations set forth in the complaint as true, draws all reasonable inferences in favor of the non-movant, and still concludes beyond a reasonable doubt that no set of facts alleged therein warrants relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996), citing *Lin v. Gatehouse Construction Co.*, 84 Ohio App.3d 96, 99, 616 N.E.2d 519 (1992).

Ohio generally follows "notice pleading," rather than fact pleading. *Bridge v. Park National Bank*, 10th Dist. No. 03AP-380, 2003-Ohio-6932, ¶5, citing *In re Election Contest of Democratic Primary Held May 4, 1999 for Clerk, Youngstown Municipal Court*, 87 Ohio St.3d 118, 120, 717 N.E.2d 701 (1999); *State ex rel. Williams Ford Sales, Inc. v. Connor*, 72 Ohio St.3d 111, 113, 647 N.E.2d 804 (1995). Civ.R. 8(A) only requires that a compliant contain "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Accordingly, a complaint "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided." Id., citing *Fancher v. Fancher*, 8 Ohio App.3d 79, 83, 455 N.E.2d 1344 (1982).

Acknowledging that "notice pleading" under Civ.R. 8(A) and Civ.R. 8(E) "requires that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action,'" the Tenth District Court of Appeals has noted that, although a plaintiff "is not ordinarily required to allege every fact in her complaint that she intends to prove, as such facts may not be available until after discovery is conducted," the complaint must nonetheless "'contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be on the theory suggested or intended by the pleader, or

contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. No. 01AP-508, 2002 Ohio App. LEXIS 503, *7-8 (Feb. 12, 2002), citing *DeVore v. Mutual of Omaha*, 32 Ohio App.2d 36, 38, 288 N.E.2d 202 (1972); *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991); *Fancher v. Fancher*, 8 Ohio App.3d 79, 83, 455 N.E.2d 1344 (1982); *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 165, 499 N.E.2d 1291 (1985).

Although the Court notes Plaintiff is proceeding *pro se*, the Ohio Rules of Civil Procedure apply equally to all litigants, and *pro se* litigants "are presumed to have knowledge of the law and legal procedures and *** they are held to the same standard as litigants who are represented by counsel." *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25, ¶10, quoting *Sabouri v. Ohio Dept of Job & Family Services*, 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (2001). It is well-established that parties "'who choose to represent themselves in judicial proceedings are entitled to no greater constitutional protections than those who choose to be represented by counsel.'" *Tunison v. AG*, 10th Dist. No. 03AP-457, 2004-Ohio-1062, ¶5, citing *Franklin County Dist. Bd. of Health v. Sturgill*, 10th Dist. No. 99AP-362, 1999 Ohio App. LEXIS 5984 (Dec. 14, 1999), quoting *Justice v. Kolb*, 10th Dist. No. 79AP-768, 1980 Ohio App. LEXIS 10849 (June 3, 1980). Therefore, the Court must apply all procedural rules to all parties equally, regardless of whether the parties are represented by counsel or not.

Having reviewed Plaintiff's Complaint – or the documents that comprise the same – the Court finds Plaintiff has failed to set forth a short and plain statement of the facts forming the basis for his claims, or to even identify any claims or any requested relief. Plaintiff's 53-page Complaint consists of a cover page containing the case caption and the following text: "Now

comes the Plaintiff, John W. Herring, by and through the undersigned counsel, and for its (sic) Complaint against the Defendants, states as follows:." The remainder of the Complaint is an assortment of documents, including numerous letters, excerpts from unidentified documents, policies and articles, e-mails, copies of W-2 forms, and urine test documentation. The documents attached to Plaintiff's Complaint indicate Plaintiff was injured on the job on April 30, 2010, he underwent a urine test on May 3, 2010, the test results came back positive for cocaine, Plaintiff was allowed by his doctor to return to work under restrictions (not to lift anything heavier than 20 pounds), and he was subsequently terminated from his employment. The letters also indicate Plaintiff had an altercation with the doctor who examined him on May 3, 2010, the doctor allegedly assaulted him, and the urine sample spilled on the counter prior to it being tested. Various letters written by Plaintiff and by alleged former co-workers also recount alleged instances where Plaintiff was allegedly discriminated against and was told not to wear his Walmart hat while at work.

Even accepting the same to be true and inferring all reasonable inferences therefrom in favor of Plaintiff, the Court cannot say – without itself engaging in advocacy on Plaintiff's behalf and drafting the legal theories and claims for relief that might exist in this case – exactly what claims Plaintiff is asserting in this action. Plaintiff's Complaint – which, with the exception of the cover page and caption consists entirely of letters and various excerpts from documents, policies and other forms of correspondence – fails to set forth a short and plain statement of the claims entitling Plaintiff to relief, or to even identify any claims for relief.

Numerous Ohio courts, while reviewing *pro se* pleadings that were dismissed pursuant to Civ.R. 12(B)(6), have acknowledged that *pro se* litigants are not entitled to any greater constitutional protections than represented litigants, and it is not the duty of the trial court to act

as an advocate for *pro se* litigants. In *Copeland v. Summit County Probate Court*, 9th Dist. No. 24648, 2009-Ohio-4860, the appellants, who were nephews of a deceased female, sued the probate court, executors and attorneys involved in the probating of the deceased's estate. The nephews' *pro se* complaint had been dismissed by the trial court pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. The Ninth Appellate District, while reviewing the dismissal *de novo*, described the at-issue pleading as follows:

> *** the Copelands' complaint is not organized into counts and does not specify which of the alleged claims listed on the cover page apply to which Defendants. A closer reading of the Copelands' complaint reveals that it is comprised of an unconnected series of rants towards the probate court, the judge who presides over their aunt's estate's ongoing probate case, the executors chosen to handle their aunt's estate, and the attorneys representing the executors. The complaint accuses Defendants of somehow cheating the Copelands and their deceased mother out of their inheritance and includes statements such as those that follow:
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> ***
>
> The remainder of the Copelands' complaint is similarly disjointed, laced with profanities, and interspersed with various probate filings and correspondence that apparently relate to the ongoing probate case.

Copeland v. Summit County Probate Court, 2009-Ohio-4860, at ¶9. The Ninth Appellate District found the subject pleading failed to set forth a claim upon which relief could be granted and it therefore affirmed the trial court's dismissal of the same.

In *McGrath v. Management & Training Corp*., 11th Dist. No. 2001-A-0014, 2001 Ohio App. LEXIS 5643, the *pro se* prison inmate sued the prison managers, alleging they took over-the-counter medications from him, failed to give his medical problems any special consideration, and defamed him in front of other inmates. The Eleventh Appellate District found the trial court's dismissal of the *pro se* complaint pursuant to Civ.R. 12(B)(6) was proper because the pleading failed to state any facts entitling the inmate to relief. In doing so, the appellate court

cited to the United States District Court for the Southern District of Ohio's decision in *Ashiegbu v. Purviance*, 74 F. Supp.2d 740 (S.D. Ohio 1998), where the federal court stated as follows:

> A court should make a reasonable attempt to read the pleadings to state a valid claim on which the plaintiff could prevail, despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with the pleading requirements. See *Hall v. Bellmon* (10th Cir. 1991), 935 F.2d 1106, 1110. This standard does not mean, however, that *pro se* plaintiffs are entitled to take every case to trial. See *Pilgrim v. Littlefield* (6th Cir. 1996), 92 F.3d 413, 416. *Indeed, courts should not assume the role of advocate for the pro se litigant.*

(Emphasis added.) *Ashiegbu v. Purviance,* 74 F. Supp.2d at 746.

The Eleventh Appellate District further held that "[a] trial court does not have the duty of assisting a *pro se* litigant in the practice of law. It is not the trial court's job to clean up deficient pleadings." *McGrath v. Management & Training Corp*, 2001 Ohio App. LEXIS 5643, at *6-7. It also cited to *Cominsky v. Malner*, 11th Dist. No. 98-L-242, 2000 Ohio App. LEXIS 6205 (Dec. 29, 2000), in support of the argument that, in the context of a litigant's failure to comply with App.R. 16(A)(7), "it 'would be manifestly unfair to the opposing parties' for this court to step into the role of advocate for a party and to do the work the party should itself have done." *McGrath*, 2001 Ohio App. LEXIS 5643, at *6, quoting *Cominsky*, 2000 Ohio App. LEXIS 6205, at *15.

So, too, the Court cannot in this case take on the role of Plaintiff's attorney, crafting claims for relief on his behalf when Plaintiff has failed to identify any causes of action or claims for relief, or even set forth any allegations or facts upon which relief could be granted.

In light of the foregoing, the Court hereby **GRANTS** the Wal-Mart Defendants' April 1, 2011 Motion to Dismiss

IT IS SO ORDERED.

Copies to:

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Franklin County Court of Common Pleas

Date: 03-01-2012

Case Title: JOHN W HERRING -VS- UC EXPRESS

Case Number: 11CV002439

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Guy L. Reece, II

Court Disposition

Case Number: 11CV002439

Case Style: JOHN W HERRING -VS- UC EXPRESS

Case Terminated: 08 - Dismissal with/without prejudice

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0024392011-04-0199970000
   Document Title: 04-01-2011-MOTION TO DISMISS
   Disposition: MOTION GRANTED