IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

INDRA BROWN,	:	APPEAL NO. C-150345 TRIAL NO. A-1500576
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
CINCINNATI PUBLIC SCHOOLS,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 26, 2016

Freking & Betz LLC, *Brian P. Gillan* and *John P. Concannon*, for Plaintiff-Appellant,

Daniel J. Hoying, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Plaintiff-appellant Indra Brown appeals from the trial court's order granting defendant-appellee Cincinnati Public School's ("CPS") motion to dismiss the complaint. We affirm the trial court's judgment.

{¶2} On January 30, 2015, Brown, a former teacher, filed suit against CPS, alleging breach of contract and promissory estoppel based upon its failure to pay her $60,000 in accrued but unused sick leave upon her separation from employment. Brown's claims were based upon a provision in the collective-bargaining agreement between CPS and the Cincinnati Federation of Teachers, the employee organization that represents CPS's teachers.

{¶3} CPS filed a motion to dismiss Brown's complaint pursuant to Civ.R. 12(B)(1) for lack of subject-matter jurisdiction and Civ.R. 12(B)(6) for failure to state a claim. Following a hearing, the trial court granted CPS's motion to dismiss on both Civ.R. 12(B)(1) and (B)(6) grounds.

{¶4} In her first assignment of error, Brown argues the trial court erred by considering materials outside the complaint when granting CPS's Civ.R. 12(B) motion.

{¶5} Appellate review of a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(1) and (B)(6) is denovo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5; *State ex rel. Ohio Civ. Serv. Emp. Assn. v. State*, __ Ohio St.3d ___, 2016-Ohio-478, __ N.E.3d ___, ¶ 12.

{¶6} Here, CPS moved to dismiss Brown's complaint under both Civ.R. 12(B)(1) and (B)(6). In her brief, Brown cites only the standard for a Civ.R. 12(B)(6) motion, and argues that the trial court erred in granting CPS's motion under that standard by considering materials outside the complaint without giving Brown the

opportunity to present materials in accordance with Civ.R. 56. Brown does not mention that CPS also sought to dismiss her claims under Civ.R. 12(B)(1). Nor does Brown cite the standard for a Civ.R. 12(B)(1) motion or argue why the trial court erred in granting the motion under that standard.

{¶7} The standards for the two motions are different. Under Civ.R. 12(B)(6), the trial court cannot consider matters outside the pleadings. *McComb v. Suburban Natural Gas Co.*, 85 Ohio App.3d 397, 400, 619 N.E.2d 1109 (3d Dist.1993). Dismissal is appropriate only 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." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975), quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct.99, 2 L.Ed.2d 80 (1957). The court, moreover, is required to "accept as true all factual allegations in the complaint." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶8} When determining whether dismissal is warranted under Civ.R. 12(B)(1), the court must determine if the plaintiff has alleged "any cause of action cognizable by the forum." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). The Ohio Supreme Court has held that "the trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Southgate Dev. Corp. v. Columbus Gas Transm. Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus; *see Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990), fn. 3;

Wilkerson v. Howell Contrs., Inc., 163 Ohio App.3d 38, 2005-Ohio-4418, 836 N.E.2d 29, ¶ 9 (1st Dist.).

{¶9} Our review of the transcript of the hearing on CPS's motion to dismiss reveals that while the trial court did discuss other facts, which were unrelated to the motion to dismiss, the trial court's stated reasoning for granting the motion was that the parties' dispute over Brown's right to be paid for her accrued but unused sick time was covered by the collective-bargaining agreement, and that Brown should have either grieved the issue under the collective-bargaining agreement or appealed the matter to the State Employee Relations Board ("SERB").

{¶10} The trial court's stated reasoning at the hearing is reflected in its entry granting CPS's motion to dismiss, in which the trial court expressly stated that

> after careful consideration of all the materials in the record that may be considered under Civ.R. 12(B)(1) and 12(B)(6), the court finds the motion well taken. Plaintiff's claims arise under the collective bargaining agreement between the Defendant and the Cincinnati Federation of Teachers Union. The remedies available to plaintiff under the Ohio Rev. Code 4117 are exclusive, including filing a grievance or filing an administrative charge with the State Employee Relations Board (SERB). The Court lacks subject matter jurisdiction over the claims in Plaintiff's Complaint. Accordingly, the Complaint is dismissed in its entirety.

{¶11} Under the Civ.R. 12(B)(1) standard, the trial court was permitted to consider any material relevant to its jurisdictional inquiry, including the collective-bargaining agreement, without converting the motion into a Civ.R. 56 motion for summary judgment. *See Bryant v. Witkosky*, 11th Dist. Portage No. 2001-P-0047,

2002-Ohio-1477, *3 (holding that the trial court could consider a collective-bargaining agreement when determining its jurisdiction under Civ.R. 12(B)(1) to hear the plaintiff's claim). As a result, we overrule Brown's first assignment of error.

{¶12} In her second assignment of error, Brown argues the trial court erred in dismissing her claims. She argues that because she was not a teacher at the time the payment of her accrued sick leave ripened, she is not a "grievant" as defined in the collective-bargaining agreement, and therefore, she had no obligation to grieve the matter or to exhaust her administrative remedies.

{¶13} Brown relies on a series of cases that hold where a collective-bargaining agreement does not provide "in express words that the retiree must exhaust contractual remedies before suing the employer," there is no requirement for the retiree to exhaust such remedies before bringing suit. *See Rutledge v. Dayton Malleable, Inc.*, 20 Ohio App.3d 229, 236, 485 N.E.2d 757 (10th Dist.1984), quoting *Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177 (8th Cir.1984); *see also Featherstone v. Columbus City School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 98AP-889, 1999 Ohio App. LEXIS 1427, *8 (Mar. 30, 1999); *Independence Fire Fighters Assn. v. Independence*, 121 Ohio App.3d 716, 721, 700 N.E.2d 909 (8th Dist.1997); *Carter v. Trotwood Madison City Bd. of Edn.*, 181 Ohio App.3d 764, 2009-Ohio-1769, 910 N.E.2d 1088, ¶ 23-46. We have reviewed the collective-bargaining agreement in this case and agree with Brown that retirees are not included in the definition of a grievant as set forth in the collective-bargaining agreement. Thus, Brown was not required to exhaust the grievance procedure before bringing suit against the CPS.

{¶14} We reach a different conclusion, however, with respect to the trial court's conclusion that Brown should have appealed the matter to SERB. Our conclusion is based upon the reasoning of the Second Appellate District in *Carter* at

¶ 48-72. Because Brown's claims arise from and are dependent upon the collective-bargaining agreement, we hold that SERB has exclusive jurisdiction to entertain the matter, and that the trial court properly dismissed Brown's claim on this basis. We, therefore, overrule Brown's second assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

MOCK and **STAUTBERG, JJ.,** concur.

Please note:

The court has recorded its own entry this date.