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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY PLATT,)
)
Appellant-Plaintiff,)
)
vs.)
)
INDIANAPOLIS PUBLIC TRANSPORTATION)
CORPORATION,)
)
Appellee-Defendant.)

No. 49A02-1105-CT-417

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David A. Shaheed, Judge
Cause No. 49D01-1102-CT-6243

October 18, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Timothy Platt appeals from the trial court's order dismissing his petition, requesting a declaratory judgment for failure to state a claim. Finding no error, we affirm the decision of the trial court.

FACTS

Platt was hired by the Indianapolis Public Transportation Corporation (IndyGo) on November 9, 2009, and continues to be employed by IndyGo. On September 23, 2010, IndyGo entered into a written contract with the members of Local 1070, Amalgamated Transit Union (the Union). That contract is not in the record and was not attached to Platt's petition.

On February 16, 2011, Platt filed a pro se "Petition For Declaration Of Rights & Status." Appellant's App. p. 7. Platt's petition requested a "determination on questions of construction arising under the contract." Appellant's App. p. 8. These questions are somewhat unclear but appear to involve whether IndyGo must recognize under the Fourteenth Amendment to the United States Constitution the liberty and property interests of its public employees; whether IndyGo's "Just Cause" standard creates a property interest for the responding public employees; whether IndyGo may use its disciplinary policy to retaliate against Platt's use of the IndyGo service mark; and the manner in which IndyGo may enforce its policies and procedures. Id.

The petition identifies IndyGo as the "Respondent" and the members of the Union as "Additional Interested Parties." Appellant's App. p. 7. On April 15, 2011, IndyGo filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6). The motion was

granted, and the petition was dismissed without prejudice on April 18, 2011. On April 25, 2011, the Union filed a motion to dismiss, and a hearing was set for July 11, 2011; however, Platt filed a notice of appeal on May 4, 2011.

DISCUSSION AND DECISION

I. Ex Parte Order

As an initial matter, we will address Platt's misguided assertion that the trial court's order dismissing his petition was a biased ex parte order against a pro se litigant. First, Platt's appellate brief gives us the firm impression that he has an incorrect understanding of the meaning of the term "ex parte." Our Supreme Court has defined "ex parte communications as 'a generally prohibited communication between counsel and the court when opposing counsel is not present.'" Worman Enters, Inc. v. Cnty. Solid Waste Mgmt. Dist., 805 N.E.2d 369, 374-75 (Ind. 2004) (quoting Black's Law Dictionary 597 (7th ed. 1999)).

What Platt actually appears to be complaining about is that the trial court granted IndyGo's motion to dismiss without giving him the opportunity to file a response and without holding a hearing. In Sinn v. Faulkner, 486 N.E.2d 596, 597 (Ind. Ct. App. 1985), this Court concluded that a response to a motion to dismiss is not a "pleading" within the purview of Trial Rule 6(C) and, consequently, the trial court did not have to wait twenty days before dismissing the plaintiff's complaint. Likewise, this Court found that while Trial Rule 56 requires a hearing on a motion for summary judgment, "the rules contain no indication that a hearing on a 12(B) motion to dismiss is required." Id. at 597-

98. Accordingly, the Indiana Trial Rules do not require that a trial court wait for a party to file a response to a motion to dismiss or hold a hearing before ruling on the motion.

That being said, we take issue with the following statements in Platt's appellate brief:

Considering that the trial court and the appellee governmental unit violated the traditional aspects of substantive due process by ignoring the Indiana Rules of Trial Procedure so as to issue an unjustified ex parte order unfavorable to a pro se litigant, Mr. Platt is left only to assume that the absence of a rational explanation is revealing of the Indiana Judiciary's anti-pro se litigant bias. In addition, the expeditious nature of the ex parte order is implicit of that anti-pro se litigant bias present within the Indiana Judiciary.

Appellant's Br. p. 11-12.

As noted by our Supreme Court many years ago,

the purpose of a brief is to present the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Muncie & Portland Traction Co., 166 Ind. 466, 466, 77 N.E. 941, 941-42 (1906)).

Put another way, the purpose of a brief is to inform and educate the court rather than to engage in offensive discourse that will not assist the court in bringing the controversy to a proper resolution. While we recognize that Platt's strong language was motivated, in part, by his misunderstanding of the law and procedure, we caution him regarding the language he chooses to use in the future. See Pitman v. Pitman, 717 N.E.2d

627, 634 (Ind. Ct. App. 1999) (stating that this court has “plenary power to order a brief stricken from our files for the use of impertinent, intemperate, scandalous, or vituperative language on appeal impugning or disparaging this court, the trial court, or opposing counsel”).

II. Failure to State a Claim

Moving forward to the substance of Platt’s appeal, he argues that the trial court erred when it dismissed his petition pursuant to Indiana Trial Rule 12(B)(6). A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim rather than the facts supporting it. Charter One Mortg. Corp. v. Condra, 865 N.E.2d 602, 604 (Ind. 2007). When reviewing a motion to dismiss, this Court views the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in favor of the nonmoving party. City of New Haven v. Reichhart, 748 N.E.2d 374, 277 (Ind. 2001). A dismissal under Rule 12(B)(6) should not be affirmed “unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances.” Couch v. Hamilton Cnty. Bd. of Zoning Appeals, 609 N.E.2d 39, 41 (Ind. Ct. App. 1993),

Here, in Platt’s petition, his first claim is that IndyGo violated his liberty by using its disciplinary policy as retaliation for Platt’s “lawful action – the fair use of the IndyGo service mark.” Appellant’s App. p. 8. Initially, we note that Platt’s petition fails to cite to any facts or authority to support his assertion that his use of the IndyGo service mark was lawful. Indeed, pursuant to Indiana Code section 24-2-1-13.5, the owner of a famous

mark is entitled to injunctive relief against another person's commercial use of that mark, absent a few exceptions. Additionally, Platt failed to attach the contract and disciplinary policy that IndyGo alleged to have misused. Accordingly, Platt failed to provide enough facts and information sufficient to state a claim upon which relief could be granted.

Platt's second claim alleged that IndyGo violated his liberty interests when an IndyGo service counter supervisor abused his "oversight authority on a matter outside [IndyGo's] collectively bargained jurisdiction defined by the Agreement." Appellant's App. p. 8. Platt does not explain what liberty interests were violated or how they were violated. In addition, Platt does not explain what damages were incurred. To obtain declaratory relief, the plaintiff must show that he has a "substantial present interest in the relief sought." Nass v. State ex rel. Unity Team, 718 N.E.2d 757, 764 (Ind. Ct. App. 1999). Platt's petition is devoid of anything showing that he has a substantial present interest in the relief sought. Consequently, Platt's second claim is insufficient to survive a motion to dismiss.

Platt's third claim alleged that IndyGo misused its disciplinary policy to retaliate against his "lawful action – Seeking redress concerning the supervisor's violation of Mr. Platt's liberty." Appellant's App. p. 8. Similar to Platt's second claim, he does not allege any real or threatened damages. Furthermore, Platt failed to attach the disciplinary policy and state how it was misused to violate his liberty. Thus, Platt's third claim also fails to pass muster under Rule 12(B)(6).

Moreover, even if we view Platt's petition as alleging claims arising solely under the United States Constitution, the Federal District Court for the Southern District of Indiana has determined that a public employee who has not been terminated from his employment does not have a cognizable "liberty interest" protected by the United States Constitution. Warfield v. Adams, 582 F. Supp. 111, 115 (S.D. Ind. 1984). Although it is unclear what, if any damages Platt actually claims, he has not been terminated from employment. Consequently, this claim fails, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.