

**IN THE FRANKLIN COUNTY COMMON PLEAS COURT
CIVIL DIVISION
COLUMBUS, OHIO**

Students for Concealed Carry Foundation, Inc., <i>et al.</i>,	:	Case No. 14CV6927
	:	
Plaintiffs,	:	Judge Hogan
	:	
vs.	:	
	:	
The Ohio State University,	:	
	:	
Defendant.	:	

**PLAINTIFF STUDENTS FOR CONCEALED CARRY FOUNDATION, INC., ET AL.,’S
MEMORANDUM IN OPPOSITION TO THE DEFENDANT THE OHIO STATE
UNIVERSITY’S MOTION TO DISMISS ITS AMENDED COMPLAINT**

I. FACTS & PROCEDURAL POSTURE

The Defendant Ohio State University on September 16, 2014 filed a Motion to Dismiss the Plaintiffs’ Amended Complaint filed on September 2, 2014. The Plaintiffs herein are Students for Concealed Carry Foundation, Inc., Ohioans for Concealed Carry and Ryan A. Guenther, an OSU undergraduate student. By agreement of the parties, Plaintiffs were given leave to file this opposition to the motion until October 16, 2014. The Plaintiffs’ first claim requests a declaratory judgment, on the basis that the sole Defendant Ohio State University’s campus legislation (rules, regulations, policies), codified in four places identified below, violate Ohio law:

- 1.) Code of Student Conduct, codified at Ohio Administrative Code (OAC) Rule 3335-23-04 Prohibited conduct, at subsection D “Dangerous weapons or devices,”
- 2.) Human Resources Policy No. 7.05, Workplace Violence;

- 3.) Department of Recreational Sports, Standards of Conduct, at Section "4. SAFETY 4.1 Firearms and Weapons"
- 4.) 2013-14 Residence Hall Handbook, Community Standards of Conduct, at Section: "7.2 Firearms and Weapons"
(Am. Complaint at paras. 9-12)

The issue before this honorable Court is if the above unlawful rules constitute an a violation of Article I, Section 4 of the Constitution of the State of Ohio and Ohio Revised Code Section 9.68, which pre-empts local and institutional firearms regulation, leaving that privilege to the Ohio legislature (see Am. Complaint at para. 26). The Plaintiffs' second claim alleges that due to the egregious violations by Defendant of their Civil Rights, that this honorable Court should grant Plaintiffs a permanent injunction against Defendant OSU to ensure that its illegal behavior is not perpetuated (Am. Complaint at para. 39). The Defendant's third claim requests their attorney fees, court and litigation expenses be recompensed by the Defendant, OSU, as provided for by law, see, e.g., ORC § 9.68 (Am. Complaint at para. 41). To be clear, the Plaintiffs are not requesting any damages from the state of Ohio in any form for Ohio State University's illegal conduct. They ask only that the law be complied with!

In its motion to dismiss, the Attorney General asserts two branches for its motion. The first branch of the motion asserts that the challengers to OSU's unlawful rules lack standing such that this Court lacks subject matter jurisdiction¹. The second branch of the motion asserts that the Plaintiffs fail to state claims for relief cognizable by this Court.

¹ Defendant OSU explicitly grants that Plaintiff Guenther has standing to challenge the first regulation, the Student Code of Conduct. See, e.g. Motion to Dismiss (MTD) at para.1.

For the purposes of this responsive memorandum, the Plaintiff believes that the Defendant accurately stated the procedural posture of this matter its “current proceedings” recitation in its motion to dismiss at numeral II.² However, the Plaintiff deserves their day in court to be able to prove claims, contrary to the Defendant’s assertions. If the Defendant’s claims are meritorious, then some discovery should be taken to establish this and the Defendant could file a motion for summary judgment, rather than a Civ. R. 12(B) motion.

II. LAW & ARGUMENT

Initially, we note that the Supreme Court of Ohio has ruled in *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779 at para. 7, that, as it regards state law, “Today, we reiterate that the right to bear arms is fundamental.” The *Klein* Court went on to acknowledge that this right was not absolute and could be limited at times. However, the entire tone of the Defendant’s motion reveals a lack of acknowledgment that the right to keep and bear arms (RKBA) and the right to self-defense are fundamental, individual Constitutional rights and rights provided for under the Ohio and United States Constitutions, see, e.g., Article I, Section 4, Ohio Constitution, *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010)³. There are Constitutional and statutory issues of some magnitude presented, namely, how are OSU students to exercise their Constitutional and statutory RKBA, and thus, self-defense, in the face of multiple illegal rules adopted by Defendant, OSU?

² However, the Plaintiff does not concede what can be described as Defendant’s slanted characterization of the “legal background” and Plaintiffs’ claims in the amended complaint, see, e.g., “Plaintiffs chiefly challenge how these provisions affect open carry” and “their central claim” and “secondary challenge” all at pp.2-4 of MTD.

³ For example, Defendant states several times in its MTD that its unlawful rules restricting gun rights are “not coercive.” If OSU students were exercising their First Amendment right to free exercise of religion by praying, we wonder if OSU would find it “not coercive” to outlaw such practice in its Student Code of Conduct.

Initially, we note that the claims made by Plaintiffs in the Amended Complaint more than comply with the Civil Rules requirement for “Notice” pleading, see, e.g. Civ. R. 8(A) and 8(E). Civ. R. 8(F) states: “All pleadings shall be so construed as to do substantial justice.” How does denying this Court subject matter jurisdiction under these circumstances further “substantial justice”, when important, fundamental rights are at issue? The answer is, it does not. Adjudication of this lawsuit on the merits affords substantial justice to the parties.

A. What are the Legal Standards for Civ. R. 12(B) motions?

What is the legal standard applicable to the Defendant’s motion? The function of a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of a statement of claim in a pleading. *See Zeigler v. Bovo, 1999 WL 4080, No. 98 CA 65 (5th Dist. Ct. App., Richland, 12-23-98)*. Generally, the defense of failure to state a claim upon which relief can be granted asserts that the pleader has failed to plead the operative grounds creating a claim. *Mitchell v. Lawson Milk Co., (1988) 40 Ohio St.3d 190; O’Brien v. University Community Tenants Union, Inc. (1975) 42 Ohio St.2d 242; Iskander v. Ford Motor Co., (1978) 59 Ohio App.2d 325 (9th Dist. Ct. App.)*.

Rule 12(B) motions may only rest on the averments in the pleadings filed, not external information, *Welch v. Estate of Cavin, 2004-Ohio-62 (10th Dist.)*. The Defendant’s motion to dismiss is replete with unsourced, extra-record material not properly before this Court in evidence, see, e.g., pages 11-12 with the discussion of what state agencies purportedly do with firearms regulation. “The court cannot resort to evidence outside the complaint to support dismissal for failure to state a claim; an

exception to this prohibition is where certain written instruments are attached to the complaint.”, see, e.g., *Park v. Acierno*, 2005-Ohio-1332 (7th Dist., Mahoning) at hn 5. In addition, see, e.g., *Hunt v. Marksman Prod., Div. of S/R Industries, Inc.*, 101 Ohio App. 3d 760, 656 N.E.2d 726 (9th Dist. Summit County 1995) (In ruling on a motion to dismiss for the failure to state a claim, because all factual allegations in the complaint are presumed true, only legal issues are presented and the entry of dismissal on the pleadings will be reviewed *de novo*).

B. The Plaintiffs have standing & the Court has subject matter jurisdiction.

The issue of organizational standing of the two organizational Plaintiffs has been raised by the Defendant. The rule set forth by the Supreme Court in *Ohio Contractors Association v. Bicking*, 1994-Ohio-183, is that an organization has standing to sue on behalf of its members when three circumstances are present. First, its members would otherwise have standing to sue in their own right. Second, the interests it seeks to protect are germane to the organization’s purpose. Third, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The association party must establish that its members have sustained injury. Quoting *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977).

The attached affidavit of Patsy K. LaRosa is incorporated into this Memorandum in Opposition and attached as Exhibit A. Ms. LaRosa helps establish the standing of the Plaintiffs. First, Ms. LaRosa states that she is an employee of Defendant OSU (para. 5), she is a member of Plaintiff Ohioans for Concealed Carry (para. 3), that she holds an Ohio Concealed Handgun License (CHL) and regularly carries guns for self defense (para. 6) and would like to carry a gun at OSU for self-defense, but is unable to

do so due to the unlawful rules of Defendant (para. 7). She also states that she is suffering ongoing harm by having her rights violated, including fearing termination and other negative job repercussions if she asserted her gun rights (paras. 7-9).

Second, the interests sought to be protected in this lawsuit by Plaintiff Ohioans for Concealed Carry (OFCC) are germane to the organization's purpose. In the Plaintiffs' Amended Complaint at para. 2, the purpose was stated as: "* * * OFCC's mission became to refine the concealed carry law and to restore and preserve the rights of all gun owners in Ohio." The fact that some of the claims presented by the Plaintiffs might involve so called "open carry" of firearms is entirely consistent with the organizational purpose of OFCC stated in the Amended Complaint. The fact that the group's name focuses on "concealed carry" is hardly dispositive and a more thorough factual inquiry must take place, precluding the possibility of dismissal at this time.

Third, these claims being asserted and the relief requested do not require the participation of individual members of the organizational Plaintiffs. Once OSU corrects its illegal rules and improper records, then all is well again. The claims presented and remedies sought, lend these matters easily to adjudication with organizational plaintiffs and not necessarily individual ones. Moreover, para. 24 of the Amended Complaint states: "Plaintiffs Students for Concealed Carry foundation, Inc., and Ohioans for Concealed Carry, assert that (1) its members have proper standing individually, including co-Plaintiff Ryan A. Guenther, (2) the interest of the Plaintiffs' being sought to be protected are germane to Plaintiffs' organizational purposes as stated in this Complaint, and (3) the participation of any individual member is not required to achieve that which is requested in the prayer for relief."

The Defendant suggests that the Plaintiffs lack standing to advance the ban on guns in locked vehicles. However, paras. 18 and 22 discuss the harms and injuries suffered by Plaintiffs' due to OSU's unlawful rules. The fact that that specific automobile storage provision was not pled, does not cause a defect in standing. As noted above, notice pleading is the rule of law.

The overall circularity of the Defendant's argument is that OSU may do whatever it likes with respect to guns on campus, because it is a private property owner, citing *Cooper v. Roose*, 151 Ohio St.316 (1949) and because it may promulgate rules to govern campus life. *Cooper* was a premises liability case involving negligence liability for a private landlord. It really has no application to the facts and law currently before this Court. In point of fact, a case with closer application is *Smith v. Ohio Northern University*, 33 Ohio App.3d 28 (3rd Dist., 1986). In *Smith*, the Court wrote in its syllabus: "A college or university may promulgate rules or regulations necessary to the orderly management of the institution, provided that such rules and regulations are **reasonable, not arbitrarily applied, and consistent with state and federal law.**" (emphasis added)

Although *Smith* involved a private and not public university, it discusses the importance of determining the reasonableness, application and consistency of university regulations with applicable law. What better method is there to apply this test than to allow for some discovery and then permit this Court to rule on the merits? It is the Plaintiffs' contention that if the Defendant disciplines students, employees and visitors, consistent with its unlawful rules, then it is flagrantly violating the law. The fact that the firearms rules and policies at OSU are contradictory (see, e.g. p. 15 of the MTD, para.

1) is not a defense for the University; it provides further basis for this declaratory judgment action and evidence of arbitrary rule making and enforcement.

C. The Defendant OSU cannot ignore specific statutory state law.

Defendant OSU argues throughout its motion to dismiss that it can enact rules and regulations that contradict state law. In *State ex rel. Kildow v. Industrial Commission of Ohio*, 128 Ohio St. 573 (1934), the Supreme Court stated, at hn 2: “Industrial Commission cannot, in exercising its rule-making power, enter field that General Assembly has preempted by legislative enactment.” Given that the Ohio General Assembly has preempted the regulation of firearms, Defendant OSU’s unlawful rules are clearly at odds with the aforementioned rule of law. Thus this lawsuit must proceed.

The law on this subject was further set forth in the case styled *Steinhour v. Ohio State University*, 62 Ohio App.3d 704 (10th Dist., 1989). In *Steinhour*, the Court ruled that a university administrative rule and departmental policies concerning sick leave usage were unreasonable, when these directly conflicted with a state statute establishing minimum sick leave entitlements for university employees, at hn 2. This is just like the case before the Court now.

Previously, in *Spinak v. University of Akron*, 3 Ohio App.3d 38 (10th Dist., 1981), the 10th District held that a faculty manual setting a mandatory retirement age could not overrule a specific state statute on the subject. The Court wrote at p. 389: “The issue is whether a state university may, by its faculty manual or rules and regulations, provide for mandatory retirement of a tenured faculty member solely because he has reached the age of sixty-five. **** Both a local board of education and the board of trustees of a

state university have broad authority to promulgate rules and regulations for the operation of the school system for which they are responsible, but in neither case can those rules and regulations override the general law of the state *** p. 390.”

In the *Steinhour* and the *Spinak* cases, the two public universities tried to circumvent statutory state law (as OSU is attempting here) by promulgating specific administrative rules or policies in conflict with state law. In both cases, the Franklin County Court of Appeals struck down the universities’ treating their regulations as somehow “above the law” of the State of Ohio.

The case of *West v. Board of Trustees of Miami University*, 41 Ohio App. 367 (1st Dist., 1931) provides some guidance from a Court on the reach of university rules. The *West* court stated at hn 3 “Rules and regulations, promulgated by university faculty under statutory authority, are binding on all concerned, **unless unreasonable, arbitrarily applied, or unlawful,**” (emphasis added). Thus, again, we must be able to probe the reasonableness, application and lawfulness of Defendant’s regulations. Therefore, this lawsuit must be allowed to proceed, at least through some discovery, so allow this honorable Court to consider the matter at summary judgment, if appropriate.

Defendant is a creature of statute, not above a statute (ORC § 9.68) which deals with the protection of fundamental, Constitutional rights. If the Defendant’s world view were adopted, The OSU, which is a branch of the executive, with a governing board appointed by the chief executive of the state, could promulgate whatever rules it desired that contradict state law, and it would be beyond judicial review. This is a preposterous result.

III. CONCLUSION

If this court denies Plaintiffs their right to prosecute these claims, they and their constituent members will have no other remedy. The Plaintiffs should have an opportunity to obtain evidence of the illegal, arbitrary and capricious Ohio State University activities in making up its own rules, overruling the Ohio General Assembly and directing the improper enforcement of the law to its police officers.⁴ This motion is filed at far too early of a stage in the litigation process to reasonably entertain this motion. If there is not evidence to support the Plaintiffs' claims, summary judgment might be appropriate if the Defendant establishes this to this Court's satisfaction. Further, if the Plaintiffs get to trial and the claims are not supported, then a directed verdict can be rendered upon motion of the Defendant.

Plaintiffs should not be denied a remedy for Defendant Ohio State University's actions in un-Constitutionally investigating, prosecuting and punishing lawful, Constitutionally protected behavior of students, staff and visitors to the Ohio State University. This Court should examine the facts and the law surrounding this situation and apply its equitable jurisdiction to forge a remedy that will ensure that fundamental rights and protected.

For the foregoing reasons, we would ask the court to allow the Defendant to proceed with their Amended Complaint by overruling Defendant OSU's motion to dismiss *in toto* and denying same as not well taken.

⁴ For example, Defendant should be able to obtain evidence proving that OSU is detaining, arresting, prosecuting and disciplining students, employees and visitors and therefore is committing deprivation of property/liberty of its students, employees, and visitors without due process of law and in rules not narrowly drawn and that which does not further a compelling government interest, merely the proprietary interests of OSU and the political predilections of a majority of University administrators opposed to gun rights.

Respectfully submitted,

MICHAEL R. MORAN CO., L.P.A.

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via the Clerk of Court's eFiling system to:

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this 16th day of October 2014.

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