

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES EDWARD GRANT,

Petitioner,

v.

DEBRA BARTH of Columbus, WI,

Respondent.

OPINION and ORDER

08-cv-669-slc¹

In this lawsuit brought pursuant to 42 U.S.C. § 1983, petitioner James Edward Grant alleges that respondent Debra Barth violated his constitutional rights and assorted state laws by telling police and jail officials that petitioner was stalking and harassing her daughter and “providing sex and drugs to women for a place to live.” Petitioner has requested leave to proceed in forma pauperis and has paid the initial partial filing fee.

Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if petitioner has had three or more lawsuits or appeals dismissed for lack of legal merit or if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who

¹Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. For the purpose of issuing this order only, I am assuming jurisdiction over the case.

by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2). Because petitioner is a pro se litigant, his complaint will be construed liberally as it is reviewed for these defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Petitioner must be denied leave to proceed against respondent. Petitioner's only federal claims asserted arise under 42 U.S.C. § 1983, which allows suit only against persons acting "under color of state law." There is no plausible basis to infer that respondent was acting "under color of state law" when she contacted government officials; rather than acting as a concerned mother. The "ultimate issue in determining whether a person is subject to suit under section 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

That leaves petitioner's state law claims. Petitioner alleges violations of Wis. Stat. §§ 813.12 (domestic abuse restraining orders and injunctions), 973.10 (control and supervision of probationers), 946.49 (bail jumping) and 961.573 (possession of drug paraphernalia), the same statutes upon which petitioner was later convicted. It is not clear how respondent may have violated these statutes by making the allegations she did, or how petitioner could bring a civil suit pursuant to them. In addition, petitioner alleges that defendant destroyed some of his clothing. My conclusion that petitioner's federal claims must be dismissed means that it is proper to decline to exercise jurisdiction over the state law

claims under 28 U.S.C. § 1367. Therefore, I will dismiss those claims without prejudice to petitioner's filing them in state court.

ORDER

IT IS ORDERED that:

1. Petitioner James Edward Grant's request for leave to proceed in forma pauperis is DENIED on his claims that respondent Debra Barth violated his constitutional rights and those claims are DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims that respondent Debra Barth violated assorted state laws and those claims are DISMISSED without prejudice to petitioner's filing the claims in state court;

3. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at Dodge Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 8th day of January, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge