

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

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ANTHONY M. BELL,

Petitioner,

v.

TINA PERKOFSKI and  
DEPARTMENT OF COMMUNITY CORRECTIONS,

Respondents.  
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ORDER

08-cv-68-bbc

This is a proposed civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner paid his initial partial payment in accordance with 28 U.S.C. § 1915. Because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). Although this court

will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Anthony M. Bell is currently confined at the Marathon County jail in Wausau, Wisconsin, but was previously on parole in the community after having been convicted of a crime relating to a bar fight. Respondent Department of Community Corrections is an agency of the State of Wisconsin. Respondent Tina Perkofski is petitioner's parole officer.

When petitioner was on parole, he was excited to be offered a job at the Candlewood Suites Hotel. Initially, Perkofski told petitioner that he could not clean occupied rooms. Petitioner conveyed this restriction to his employer and she said "that was fine." However, before he started working, respondent Perkofski advised the employer that petitioner would need to be watched constantly while he was working. Perkofski told the employer that

petitioner would steal if given the chance. This was a lie. Petitioner has never been “charged, questioned, involved or related to any thing that has to do with taking a person or business personal belongings.” The employer then called petitioner and told him he could not work at the hotel. Because he lost this job, petitioner has suffered financial hardship.

### OPINION

Petitioner alleges that respondent Department of Community Corrections violated Wisconsin Administrative Code § DOC 328.21 and policy #08.03.01-.02 (provisions related to personal searches of probationers and their living quarters and seemingly unrelated to the claim raised in this case) and that respondent Tina Perkofski slandered his name and defamed his character. Neither of these claims is properly raised in a lawsuit in this court.

As an initial matter, petitioner cannot sue the Department of Community of Corrections because it is an agency of the State of Wisconsin. A suit against a state agency is actually a suit against the state. A state, however, cannot be sued unless it has waived its Eleventh Amendment immunity, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1982). The State of Wisconsin has not waived its immunity for claims brought under 42 U.S.C. § 1983.

In any event, petitioner’s claim that someone may have violated his rights under Wis. Admin. Code §328.21 and policy #08.03.01-.02 is not properly raised in federal court. It

is a claim arising under state law that must be raised in state court.

Likewise, petitioner's slander and defamation claims against respondent Perkofski are tort-based state law claims that may be considered in state court only, except in instances that do not exist here. (Pursuant to 28 U.S.C. § 1332, federal courts have jurisdiction to consider state law claims when the parties are citizens of different states and the amount in controversy exceeds \$75,000.) As disturbing as it is that respondent Perkofski may have disparaged petitioner's character to his potential employer, making false defamatory statements about someone does not implicate a federal constitutional right. This is true even if the alleged defamer is a state employee, unless the defamation occurs in the course of the termination of government employment. Paul v. Davis, 424 U.S. 693, 710 (1976).

#### ORDER

IT IS ORDERED that

1. Petitioner Anthony Bell's request for leave to proceed in forma pauperis on his claims against respondents Department of Community Corrections and Tina Perkofski are DENIED because this court lacks jurisdiction to hear petitioner's state law claims.
2. The clerk of court is requested to enter judgment DISMISSING this case without prejudice to petitioner's refiling his claims in state court.
3. The unpaid balance of petitioner's filing fee is \$326.00; this amount is to be paid in

monthly payments according to 28 U.S.C. § 1915(b)(2);

4. 28 U.S.C. § 1915(g) directs the court to enter a strike when an action is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because lack of jurisdiction is not one of the reasons enumerated in § 1915(g), a strike will not be recorded against plaintiff.

Entered this 20<sup>th</sup> day of March, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge