

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

ANNABEL K. MELONGO, )  
Plaintiff, )

v. )

ASA ROBERT PODLASEK; ASA JULIE )  
GUNNIGLE; INVESTIGATOR KATE )  
O’HARA (Star No. 423; INVESTIGATOR )  
JAMES DILLON (Star No. 1068; )  
INVESTIGATOR ANTONIO RUBINO )  
(Star No. 5043; INVESTIGATOR RICH )  
LESIK (Star No. 5000; UNKNOWN )  
COOK COUNTY SHERIFF OFFICERS; )  
DR. MATTHEW S. MARKOS; LAUREL )  
LAUDIN; ASST. ATTY. GENERAL KYLE )  
FRENCH; COOK COUNTY SHERIFF )  
THOMAS DART; COOK COUNTY., )

Case No. 13-C-04924

Hon. John Z. Lee

Defendants.

**DEFENDANT FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH’S  
REPLY IN SUPPORT OF HIS MOTION TO DISMISS**

DEFENDANT FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH, by and through his counsel, LISA MADIGAN, Illinois Attorney General, respectfully submits the following reply in support of his motion to dismiss.

**BACKGROUND**

As correctly noted in her response to the motion to dismiss, Defendant Former Assistant Attorney General Kyle French raised four separate affirmative defenses in his motion to dismiss:

- (1) Absolute prosecutorial immunity,
- (2) Statute of limitations,
- (3) Qualified immunity, and
- (4) Sovereign immunity.

*Plaintiff's Response to Defendant French's Motion to Dismiss* ["Response"], Document # 70, at p. 2. However, in her response, Plaintiff fails to address the sovereign immunity issue altogether. As explained in the original motion to dismiss, the Eleventh Amendment bars money damages claims against Kyle French in his official capacity. *Defendant Kyle French's Motion to Dismiss Plaintiff's Complaint and Incorporated Memorandum of Law in Support Thereof* ["Motion to Dismiss"], Document # 62, at pp. 6-7. As Plaintiff has failed to address the sovereign immunity issue in her response, Defendant incorporates the argument set forth in the motion to dismiss on that issue and will focus on the remaining three issues for purposes of the reply.

**I. ABSOLUTE PROSECUTORIAL IMMUNITY BARS PLAINTIFF'S CLAIMS AGAINST FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH.**

Plaintiff agrees that Defendant French is protected by absolute prosecutorial immunity, but argues that some of the claims arise from non-prosecutorial functions. According to Plaintiff, Defendant French performed *investigatory* functions that would not be subject to prosecutorial immunity. In support of this argument, Plaintiff cites the paragraphs 39, 40, and 62 from her second amended complaint.

**A. Because the allegations contained in Paragraph 39 of the Amended Complaint involve prosecutorial functions, they are barred by prosecutorial immunity.**

Paragraph 39 of the Second Amended Complaint reads:

39. With a directive from Dick Devine, Defendant Cook County Investigator Randy Roberts along with Defendant Kyle French and Defendant Martin accepted Defendant Spizzirri's fabricated theory that Plaintiff had accessed SALF's servers and destroyed hundreds of financial records with no meaningful investigation. Indeed, these Defendants *ignored ample exculpatory evidence* showing that Plaintiff had no ability to access SALF's servers and could not have committed the offense of computer tampering.

This paragraph does not suggest any non-prosecutorial functions being performed by Defendant French. First, Plaintiff claims that Defendants (including Defendant French) "accepted Defendant Spizzirri's fabricated theory that Plaintiff had accessed SALF's servers and destroyed

hundreds of financial records with *no meaningful investigation.*” Next, it claims that Defendants (including Defendant French) “ignored ample exculpatory evidence....” A claim that Defendants failed to investigate before charging Plaintiff is merely a claim arising from the decision to charge Plaintiff and is thus necessarily barred by prosecutorial immunity.

**B. Even assuming *arguendo* that allegations in Paragraph 40 are investigatory and not covered by prosecutorial immunity, they would nevertheless be barred by the statute of limitations.**

While claims in paragraph 40 relating to an alleged search, if true, would be investigatory rather than prosecutorial, any claim arising from the decision to charge Plaintiff with computer tampering is intimately associated with the judicial phase of the criminal proceedings and would necessarily be barred by prosecutorial immunity. Paragraph 40 reads:

40. No factual basis existed to support a finding of probable cause that Plaintiff had committed an act of computer tampering. Notwithstanding, Defendants Roberts, Martin and French effectuated a search of Plaintiff’s apartment, arrested Plaintiff, and initiated computer tampering charges against her.

Assuming that the search was actually “effectuated” by former assistant attorney general *prior* to her arrest and the charges being filed, they could arguably be investigative and not subject to prosecutorial immunity. However, even if the Court were to find that these claims are not part of the prosecution of the charges, as more fully explained below, such claims would still necessarily be barred by the applicable statute of limitations.

**C. Even assuming *arguendo* that Plaintiff’s arrest and detention were not pursuant to Defendant’s prosecutorial functions, the claims would nonetheless be barred by the applicable statute of limitations.**

The only allegation in paragraph 62 concerning former Assistant Attorney General Kyle French is that others allegedly arrested and detained Plaintiff at the behest of French and others.

62. Plaintiff was interrogated by Defendants Dillon, Lesiak, and Rubino regarding her website and Plaintiff asserted her right to counsel. Defendants Dillon, Lesiak, and Rubino had no probable cause to detain Plaintiff for threatening a public official, but notwithstanding the lack of probable cause, Defendants Dillon, Lesiak and

Rubino arrested and detained Plaintiff. They did so at the behest of Defendants Podlasek, Gunnigle, and French. Defendants Podlasek and Gunnigle were actively investigating the case, including taking action to subpoena the websites' records.

According to Plaintiff, her interrogation, detention, and arrest took place on April 13, 2010; immediately following a psychological examination. *Complaint* at ¶ 58. Interestingly, Plaintiff states that “Defendants Podlasek and Gunnigle contacted Defendant Dillon instructing to arrest Plaintiff...” *Ibid.* In any event, there is nothing to indicate that these allegations, if true, were not taken pursuant to the lawful prosecution. Moreover, Plaintiff has effectively pleaded herself out of court by showing that any such claim is necessarily barred by the statute of limitations as discussed below.

## **II. THE STATUTE OF LIMITATIONS BARS ANY CLAIM NOT BARRED BY ABSOLUTE PROSECUTORIAL IMMUNITY.**

Federal Rule 12(b)(6) dismissal as untimely is appropriate where, as here, the plaintiff has alleged sufficient facts to establish the statute of limitations defense. *Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006) *citing United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). While, as a general rule, a plaintiff need not *anticipate* affirmative defenses to survive a motion to dismiss, the exception occurs “where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that an action is untimely under the governing statute of limitations.” *Lewis*, 411 F.3d at 842.

As an initial matter, Plaintiff admits that she did not assert claims arising from the computer tampering charges until November 5, 2014. However, according to Plaintiff's own complaint, the computer tampering charges were filed on October 31, 2006, more than eight years earlier and well beyond the applicable two-year statute of limitations. At a minimum, actions taken by Assistant Attorney General French *after* the computer tampering charges were filed are necessarily tied to the prosecution of those charges and would therefore be protected by

absolute prosecutorial immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (“acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.”). Other than malicious prosecution claims (that would necessarily be barred by prosecutorial immunity), Plaintiff’s claims accrued when she was allegedly wrongfully arrested and imprisoned. As Plaintiff states that she was arrested on April 13, 2010; her claims for false arrest and imprisonment had to be filed no later than April 13, 2012. *Second Amended Complaint* at ¶¶ 58, 70; *see Wallace v. Kato*, 549 U.S. 384, 396-397 (2007)(also holding that equitable tolling did not apply). Because her claims are barred by absolute prosecutorial immunity and/or the applicable statute of limitations, the Court should dismiss the Plaintiff’s complaint.

**III. BECAUSE QUALIFIED IMMUNITY IS IMMUNITY FROM SUIT, IT MUST BE DETERMINED PRIOR TO ANY DISCOVERY AND IT IS APPROPRIATELY DECIDED HERE WHERE PLAINTIFF HAS FAILED TO PROVE THE VIOLATION OF A CLEARLY ESTABLISHED RIGHT.**

Qualified immunity is the ability to be free from suit, not merely a defense from liability. *Jacobs v. City of Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000). As a result, the question of qualified immunity should be decided at the earliest possible stage, even at the Rule 12(b)(6) stage. *Id.* Where the plaintiff asserts a violation of a broad constitutional right that had not been articulated at the time the violation is alleged to have occurred, the plaintiff has failed to state a claim upon which relief may be granted and the court may properly dismiss the claim under 12(b)(6). *Id.* Until the threshold question of immunity has been resolved, discovery should not be allowed. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991).

Despite the fact that Defendant French properly raised the issue of qualified immunity and specifically pointed out that Plaintiff failed to allege a violation of a clearly established

statutory or constitutional right, Plaintiff fails to meet her burden of demonstrating the existence of a clearly established right. *Jacobs*, 215 F.3d at 766. Therefore, qualified immunity bars Plaintiff's complaint and warrants dismissal.

### CONCLUSION

WHEREFORE, for the foregoing reasons and those stated in the original motion and incorporated memorandum of law in support thereof, Defendant Kyle French respectfully requests this Court to dismiss the claims against him and for such other and further relief as the Court deems proper.

Date: March 18, 2015

Respectfully submitted,

\s\ Thor Y. Inouye

Thor Y. Inouye  
Assistant Attorney General  
General Law Bureau  
100 West Randolph Street, 13th Floor  
Chicago, Illinois 60601  
PHONE: (312) 814-2035  
FAX: (312) 814-4425  
*tinouye@atg.state.il.us*

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GENERAL KYLE FRENCH; COOK COUNTY	)	
SHERIFF THOMAS DART; COOK COUNTY.,	)	
Defendants.	)	

**NOTICE OF FILING**

TO: Jennifer Bonjean, 142 Joralemon St., Suite 5 A, Brooklyn, NY 10004  
 Christopher Smith, 1 North LaSalle Street, Suite 3040, Chicago, IL 60602  
 Stephen L. Garcia and Thomas Edward Nowinski, Cook County State's Attorney, 500 Richard J. Daley Center, Chicago, IL 60602  
 Christopher S. Wunder and Eric D Kaplan, Kaplan Papadakis & Gournis, P.C., 180 N. LaSalle Street, Suite 2108, Chicago, IL 60601

PLEASE TAKE NOTICE that on March 18, 2015, I caused the attached reply in support of Defendant French’s motion to dismiss to filed in the district court for the Northern District of Illinois.

Undersigned certifies that the notice and attached motion for extension of time to answer or otherwise plead was electronically served on the above listed individuals *via* CM/ECF.

Date: March 18, 2015

Respectfully submitted,

*\s\ Thor Y. Inouye*  
 Thor Y. Inouye  
 Assistant Attorney General  
 General Law Bureau  
 100 West Randolph Street, 13th Floor  
 Chicago, Illinois 60601  
 PHONE: (312) 814-3889  
 FAX: (312) 814-4425  
*tinouye@atg.state.il.us*