

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

ANNABEL K. MELONGO,)	
Plaintiff,)	
)	
v.)	
)	
ASA ROBERT PODLASEK; ASA JULIE)	Case No. 13-C-04924
GUNNIGLE; INVESTIGATOR KATE)	
O’HARA (Star No. 423; INVESTIGATOR)	Hon. John Z. Lee
JAMES DILLON (Star No. 1068;)	
INVESTIGATOR ANTONIO RUBINO)	
(Star No. 5043; INVESTIGATOR RICH)	
LESIAK (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.,)	
Defendants.)	

**DEFENDANT KYLE FRENCH’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF**

DEFENDANT FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH, by and through his counsel, LISA MADIGAN, Attorney General for the State of Illinois, respectfully moves to dismiss the claims against him.

INTRODUCTION

According to the Complaint, Plaintiff asserts claims against Defendant Kyle French for actions performed while an Assistant Attorney General involved in Plaintiff’s criminal prosecution. *Second Amended Complaint and Jury Trial Demand*, Document # 48 [“*Complaint*”]. As set forth in her complaint, there were three separate indictments against Plaintiff:

October 31, 2006 Computer tampering indictment (*Complaint* at ¶ 30).

May 28, 2008 Superceding computer tampering indictment (*Ibid.* at ¶ 43).

April 27, 2010 Eavesdropping indictment (*Ibid.* at ¶ 69).

The tampering charges arose from allegations by Plaintiff's former employer, Defendant Carol Spizzirri, that Plaintiff had caused the deletion of certain financial records. *Ibid.* at ¶ 4, 39. When a dispute arose regarding the accuracy of a court proceeding transcript, Plaintiff surreptitiously recorded telephone conversations with Pamela Taylor, who supervised the court reporter that transcribed the tampering proceedings. *Ibid.* at ¶ 49. The eavesdropping indictment resulted from these recordings.

In the first count of the Complaint, Plaintiff alleges that the Defendants (including Defendant French) violated her constitutional rights to freedom from: (a) unlawful search and seizure, (b) "unlawful arrest and seizure of her person," (c) deprivation of liberty and property without due process of law, (d) "summary punishment," (e) "arbitrary government activity which shocks the conscious [sic] of a civilized society," (f) arbitrary denial of free speech and press under the First Amendment, (g) "retaliatory arrest," and (h) "irrational differential treatment in violation of the equal protection clause." (*Ibid.* at ¶ 92). In her fourth count, Plaintiff alleges state law claims of (a) false arrest, (b) false imprisonment, (c) malicious prosecution, (d) conspiracy, (e) slander, (f) fraud, (g) negligent infliction of emotional distress, and (h) intentional infliction of emotional distress. (*Ibid.* at ¶ 104). Plaintiff asserts a claim for punitive damages in her sixth count.

ARGUMENT

I. PROSECUTORIAL IMMUNITY BARS CLAIMS AGAINST FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH.

Similar to the absolute immunity afforded to judges, prosecutors are absolutely immune from civil liability for initiating a prosecution and presenting the State's case against a criminal

defendant. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). In *Imbler*, a former prisoner whose conviction had been overturned, sued the prosecutor, alleging that “the prosecution had been wrongfully commenced, but also a charge that false testimony had been offered as well as a charge that exculpatory evidence had been suppressed.” *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997).

In rejecting qualified immunity for prosecutors, the Supreme Court reasoned that “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.” *Imbler*, 424 U.S. at 424-425. “Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.” *Id.* at 425. As a result, “[t]his immunity shields the prosecutor even if he initiates charges maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence.” *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986); *Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003). Since *Imbler*, the Supreme Court has expanded prosecutorial immunity to include presenting evidence in support of a search warrant¹ and evaluating evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.²

In this case, Plaintiff alleges that Defendant Kyle French “conducted no meaningful investigation of Spizzirri’s claims, ignored exculpatory evidence, and falsely charged and prosecuted Plaintiff for the offense of computer tampering.” *Complaint* at ¶ 6. Although Plaintiff does not specifically identify the responsible defendants individually, she also alleges

¹ *Burns v. Reed*, 500 U.S. 478 (1991).

² *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

that “[e]ven though Defendants knew that Plaintiff’s conduct of recording Taylor was protected under a statutory exemption of the Illinois Eavesdropping statute, Defendants arrested, detained, and later maliciously prosecuted Plaintiff for violating the Eavesdropping Statute.” *Ibid.* at ¶ 11. All of these challenged activities would fall under the ambit of absolute prosecutorial immunity as they involve the initiation of charges or their prosecution in court. *Imbler, supra.* Because Plaintiff’s claims are intimately associated with the judicial phase of the criminal proceedings, prosecutorial immunity bars Plaintiff’s claims.

II. THE STATUTE OF LIMITATIONS BARS ANY CLAIMS AGAINST FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH NOT SUBJECT TO PROSECUTORIAL IMMUNITY.

By its very nature, “malicious prosecution” cannot avoid the complete bar of prosecutorial immunity. And, while malicious prosecution claims do not accrue until the criminal proceedings have terminated in the plaintiff’s favor,³ any alleged “out-of-court events, such as gathering of evidence, accrue as soon as the violation occurs.” *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014). Plaintiff’s federal claims are being pursued under Section 1983. The statute of limitations for Section 1983 actions in Illinois is two years. *Dixon v. Chrans*, 986 F.2d 201, 203 (7th Cir. 1993). The statute of limitations for Illinois state law personal injury actions is also two years. 735 ILCS 5/13-202. As a result, Plaintiff had two years from the date that her cause of action accrued, which occurred when she knew or should have known that her constitutional rights had been allegedly violated. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1991). For example, a false arrest claim accrues when the claimant is detained pursuant to legal process. *Wallace v. Kato*, 549 U.S. 384, 397 (2007).

Here, any “out-of-court events” would necessarily have occurred prior to the dates of the individual complaints or indictments. According to Plaintiff, “[o]n October 31, 2006, Plaintiff

³ *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

Melongo was charged with three (3) counts of Computer Tampering....” *Complaint* at ¶ 30. Plaintiff also states that, “on April 13, 2010, a complaint was filed against Plaintiff for violating the Illinois Eavesdropping statute...” *Ibid.* at ¶ 63. Consequently, Plaintiff was required to file her complaint against Defendant French no later than April 13, 2012. The original complaint in this matter was not filed until July 10, 2013. *See Original Complaint*, Document # 1. As a result, both her federal and state claims are barred by the applicable statutes of limitations.

III. BECAUSE THERE WAS NO VIOLATION OF A CLEARLY ESTABLISHED RIGHT, QUALIFIED IMMUNITY BARS THE CLAIMS AGAINST FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH.

Even if the Plaintiff’s claims were not otherwise barred by absolute prosecutorial immunity and/or the applicable statutes of limitations, Defendant French is entitled to qualified immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Once a defendant raises the defense of qualified immunity, the plaintiff bears the burden of defeating it either by identifying a closely analogous case or by persuading the court that the conduct is so egregious and unreasonable that, notwithstanding the lack of an analogous decision, no reasonable officer could have thought he was acting lawfully. *Abbott v. Sangamon County*, 705 F.3d 706, 723-724 (7th Cir. 2013); *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Martin v. Snyder*, 329 F.3d 919, 921 (7th Cir. 2003). Unless the complaint states a claim for violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Because the decision to prosecute and any actions taken after the complaint or indictment are intimately involved in the judicial phase of the criminal proceedings, only pre-complaint or indictment actions could possibly escape the reach prosecutorial immunity. Ignoring the fact that these actions would also fall outside the statute of limitations, the only allegation concerning pre-complaint or indictment action is the alleged failure to properly investigate. As an initial matter, there is no constitutional duty to continue investigating in order to discover exculpatory evidence. *Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986) *citing Simmons v. Wainwright*, 585 F.2d 95, 96 (5th Cir.1978); *Schertz v. Waupaca County*, 875 F.2d 578 (7th Cir. 1989); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986); *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004). Because there is no right to the investigation for exculpatory evidence, let alone a clearly established right, qualified immunity necessarily bars any claim not specifically prohibited by prosecutorial immunity.

IV. SOVEREIGN IMMUNITY BARS THE STATE LAW AND OFFICIAL CAPACITY CLAIMS AGAINST FORMER ASSISTANT ATTORNEY GENERAL KYLE FRENCH.

The Eleventh Amendment prohibits money damages claims in federal court against the State unless the immunity has been waived or specifically abrogated. In the absence of any statute waiving sovereign immunity, Plaintiff is prohibited from suing the State for money damages. And, while Section 1983 may provide a federal forum to remedy many deprivations of civil liberties, it does not provide a federal forum for litigants who seek money damages against a State. *Id.* at 66.

This prohibition has been extended to money damages claims against state officials acting in their official capacity as well. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Supreme Court explicitly held that that neither a State nor its officials acting in their official capacities are “persons” within the meaning of 42 U.S.C. § 1983. *Id.* at 71. In that case,

the plaintiff filed suit under 42 U.S.C. § 1983, alleging that the Department of State Police and the Director of State Police, in his official capacity, had improperly denied him a promotion. The Court explained that, while a state official is literally a “person,” an official capacity claim is a suit against the official’s office and is no different than a suit against the State itself. *Id.* at 71; *see also Smith v. Dep’t of Agriculture*, 23 F.3d 1134, 1139 (7th Cir.1994) *citing Hans v. Louisiana*, 134 U.S. 1 (1890).

In this case, Plaintiff asserts official capacity claims against Defendant French for money damages. Because there has been neither waiver nor abrogation of sovereign immunity for these claims, the Eleventh Amendment bars these types of claims in federal court. *See Indiana Protection & Advocacy Services v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 370 (7th Cir.2010); *Council 31 of the American Federation of State, County and Municipal Employees v. Quinn*, 680 F.3d 875, 881(7th Cir. 2012). As a result, the Court should dismiss Plaintiff’s official capacity claims for money damages.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Kyle French respectfully requests this Court to dismiss the claims against him, with prejudice, and for such other and further relief as the Court deems proper.

Date: February 9, 2015

Respectfully submitted,

/s/ Thor Y. Inouye

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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.,)	
Defendants.)	

NOTICE OF MOTION

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 February 18, 2015 at 9:00 a.m., or as soon thereafter as I may be heard, I shall present the attached motion to dismiss before the Honorable Judge John Z. Lee, or anyone sitting in his stead, in courtroom 1225.

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: February 9, 2015

Respectfully submitted,

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