

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

KELLS HETHERINGTON,
Plaintiff,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State; ASHLEY MOODY, in her official capacity as Florida Attorney General; GINGER BOWDEN MADDEN, in her official capacity as State Attorney for the First Judicial Circuit in and for Escambia County, Florida; JONI ALEXIS POITIER, in her individual capacity and official capacity as member and Vice Chair of the Florida Elections Commission; BARBRA STERN, HYMBERLEEE CURRY SMITH, JASON TODD ALLEN, and J. MARTIN HAYES, in their individual capacities and official capacities as member of the Florida Elections Commission,

Defendants.

Case No.: 3:21-CV-671

MOTION TO DISMISS

COMES NOW Defendant Ginger Bowden Madden, in her official capacity as State Attorney for the First Judicial Circuit, (the “State Attorney” or “Defendant”) pursuant to Federal Rule of Civil Procedure 12(b)(6), and respectfully submits this

Motion to Dismiss Plaintiff Kells Hetherington's ("Hetherington" or "Plaintiff") Complaint [DE 1] and all claims asserted against the State Attorney and in support thereof states the following:

BACKGROUND

1. Plaintiff filed his one (1) count complaint on or about April 25, 2021 alleging violations of his First Amendment right to free speech pursuant to 42 U.S.C. § 1983. Hetherington alleges that his right to free speech was violated during a 2018 election where Hetherington ran for a position with the Escambia County School Board.

2. Specifically, Hetherington alleges that he was fined by the Florida Elections Commission ("FEC") for describing himself as a "lifelong republican" during his 2018 campaign. *See* Complaint at ¶ 16. Hetherington states in his Complaint that the FEC received a complaint from a Former Escambia County PTA President, and the FEC found probable cause to support the PTA President's Complaint. *Id.* at ¶ 17. Hetherington further states that the FEC entered a decision to fine Mr. Hetherington in the amount of \$500.00 which was eventually lowered to \$200.00 upon the FEC's reconsideration. *Id.* at ¶ 18.

3. Hetherington does not allege any factual allegations in his Complaint that the State Attorney was involved in any of the incidents of election violations from his 2018 campaign.

4. Hetherington states that he intends to run for Escambia County School Board during the next election cycle in 2022. He further states that he intends to once again mention his political party affiliation in his campaign but alleges that he refrains from doing so due to fear of enforcement of Fla Stat. § 106.143(3) by Defendants. *Id.* at ¶¶ 19-20.

5. Hetherington filed his Complaint in a shotgun approach which includes Defendants who have no relation to the enforcement of Hetherington's previous fine, or whom have no responsibility in enforcing Fla. Stat. § 106.143(3), including the State Attorney. In fact, the only mention of the State Attorney in Plaintiff's Complaint is in Paragraph 8 wherein Plaintiff states what he believes to be the State Attorney's vested duties as it relates to Florida's election laws.

6. Plaintiff's claims against the State Attorney are without merit as the State Attorney is not the investigative and/or enforcing authority of Fla. Stat. § 106.143(3). Thus, Plaintiff's Complaint against the State Attorney should be dismissed in its entirety.

LEGAL STANDARD

7. To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a complaint must [] contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 555 (2007)). A complaint fails to state a claim when it does not “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555-556. (internal quotation marks omitted) (citation omitted). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1187-88 (11th Cir. 2002) (stating that “conclusory allegations, unwarranted deductions of facts[,] or legal conclusions masquerading as facts will not prevent dismissal”)(citation omitted). While well-pleaded facts are accepted as true at this stage, this principle does not apply to legal conclusions. *See FindWhat Inv'r Grp. V. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011); *see also Iqbal*, 556 U.S. at 678.

ARGUMENT AND CITATION TO AUTHORITY

8. Fla. Stat. § 106.143 establishes the parameters for political advertisements prior to an election for those running for both partisan and non-partisan offices. *See generally* § 106. 143 Fla. Stat. The statute further states that “[a]ny person who willfully violates any provision of this section is subject to civil penalties prescribed in [§] 106.265.” Fla. Stat. § 106.143(11). The civil penalties provisions of Fla. Stat. 106.265(1) specifically provide that:

The commission or, in cases referred to the Division of Administrative Hearings pursuant to s. 106.25(5), the administrative law judge is authorized upon the finding of a violation of this chapter or chapter 104 to impose civil penalties in the form of fines not to exceed \$1,000 per count, or, if applicable, to impose a civil penalty as provided in s. 104.271 or s. 106.19.

There is no statutory provision which vests authority upon the State Attorney to enforce the provisions of Fla. Stat. § 106.143. In fact, the authority to issue civil remedies under Fla. Stat. § 106.143 specifically falls upon the FEC or the Division of Administrative Hearings pursuant to Fla. Stat. § 106.25(5).

9. Plaintiff states in his Complaint that the State Attorney is “expressly vested with the duty to investigate and prosecute violations of state law, including election laws that occur in Escambia County, Florida” and then erroneously relies upon the provisions of Fla. Stat. §§ 106.25 and 27.02 as the basis of his claims. *See* Complaint at ¶ 8. Fla. Stat. § 27.02(1) states the following:

The state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, *in which the state is a party*, except as provided in chapters 39, 984, and 985. The intake procedures of chapters 39, 984, and 985 shall apply as provided therein. The state attorney shall appear in the circuit and county courts within his or her judicial circuit for the purpose of prosecuting violations of special laws and county or municipal ordinances punishable by incarceration if the prosecution is ancillary to a state prosecution or if the state attorney has contracted with the county or municipality for reimbursement for services rendered in accordance with s. 27.34(1).

(emphasis added). Here, the State Attorney was not a party to Hetherington’s fine issued by the FEC in 2018 and would not be a party in the instance that Hetherington was subsequently fined for a violation of the same statutory provision as in 2018. Indeed, the State Attorney has significant duties as provided in Fla. Stat. § 27.02,

however, there is nothing within the statute which provides the State Attorney with any investigative or prosecutorial authority over Florida elections.

10. Plaintiff further improperly relies upon Fla. Stat. § 106.25 in support of his allegation that the State Attorney is expressly vested in investigating and prosecuting violations of election laws. Fla. Stat. § 106.25(6) provides that the State Attorney has a duty when:

receiving a complaint referred by the commission to investigate the complaint promptly and thoroughly; to undertake such criminal or civil actions as are justified by law; and to report to the commission the results of such investigation, the action taken, and the disposition thereof. The failure or refusal of a state attorney to prosecute or to initiate action upon a complaint or a referral by the commission shall not bar further action by the commission under this chapter.

(emphasis added). Thus, the only duty for the State Attorney to investigate and/or prosecute an alleged violation is if, and only if, a complaint is received from the FEC in its discretion. In fact, the very same statutory authority cited by Plaintiff explicitly states that “[j]urisdiction to investigate and determine violations of [chapter 106] and chapter 104 is vested in the Florida Elections Commission.” Fla. Stat. § 106.25(1).

11. Furthermore, in a case where probable cause is found, the FEC shall make a preliminary determination to consider the matter *or* to refer it to the state attorney for the judicial circuit in which the violation occurred.” (emphasis added) *Id.* at (4). The FEC is essentially the gatekeeper to all investigations and/or civil penalties in the instance of a campaign election violation. Although the State

Attorney may have a case referred to her office, there are no factual allegations in Plaintiff's Complaint to support maintaining an action against the State Attorney for a civil penalty which was not issued or enforced by her. Plaintiff has failed to provide any evidence which would further provide that there is a likelihood that the State Attorney would be involved in any instance of a future violation of Fla. Stat. § 106.143(3).

12. Plaintiff's complaint fails to allege *any* facts which would support a past or potential future infringement on his First Amendment rights by the State Attorney. Instead, Plaintiff's complaint contains one paragraph which contains nothing but mere legal conclusions about the State Attorney's alleged "vested" responsibilities as they relate to Florida election laws. Although Plaintiff's facts, at this stage, must be accepted as true, Plaintiff has only provided one paragraph of legal conclusions which do not support maintaining the instant action. Thus, Plaintiff's claims should be dismissed in their entirety.

CONCLUSION

Plaintiff has failed to allege any connection to the enforcement of Fla. Stat. § 106.143(3) and the State Attorney. Instead, Plaintiff's Complaint alleges that the investigation and enforcement was solely undertaken by the FEC and does not provide any factual allegations which support any past or potential future

enforcement by the State Attorney. Thus, Plaintiff's claims against the State Attorney fail as a matter of law and should be dismissed with prejudice.

Respectfully submitted this 1st day of June 2021.

/s/ Jennifer K. Sniadecki
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*Counsel for Ginger Bowden Madden,
in her capacity as the State Attorney
for the First Judicial Circuit*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 1st day of June 2021.

/s/ Jennifer K. Sniadecki
Jennifer K. Sniadecki, Esq.