Not Reported in F.Supp.2d, 2005 WL 5432453 (S.D.Fla.)
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United States District Court,
S.D. Florida.
Melvin BROOKS, Plaintiff,
v.
Ken JENNE, Broward County Sheriff, in his Official Capacity, William Kohnke, and Carol E. Dansky, Defendants.

No. 0460271CIVBANDSTRA.
Nov. 29, 2005.

James O. Walker, III, for Plaintiff.

Chris Kleppin, Harry O. Boreth, Glasser, Boreth, Ceasar & Kleppin, for Defendant.

ORDER GRANTING MOTION TO DISMISS
BANDSTRA, Magistrate J.

***1** THIS CAUSE came before the Court on Defendants' Ken Jenne and Carol E. Dansky (collectively, "Defendants") Motion to Dismiss Plaintiff Melvin Brooks' ("Plaintiff") Amended Complaint for Damages pursuant to Fed.R.Civ.P. 12(b)(6) (D.E.46) filed on August 22, 2005. After carefully reviewing the motion, the response, reply thereto, the court file, and applicable law, it is hereby ORDERED and ADJUDGED that Defendants' Motion to Dismiss is GRANTED WITH PREJUDICE, and all pending motions are DENIED AS MOOT.

I. BACKGROUND

On August 8, 2005, Plaintiff filed suit against Ken Jenne in his official capacity as Sheriff of Broward County, and Carol E. Dansky, in her individual capacity, alleging a violation of his rights pursuant to 42 U.S.C. §§ 1981, 1983, and 42 U.S.C. § 2000e *et seq.*, and pursuant to the First and Fourteenth Amendments to the United States Constitution. (D.E.43) [FN1] Plaintiff's original complaint was dismissed without prejudice on September 14, 2004 (D.E.12) on procedural grounds. On Plaintiff's motion, the Court vacated the order of dismissal and reinstated the case on October 7, 2004. (D.E.15). On October 12, 2004, Defendants filed a Motion to Dismiss Plaintiff's Reinstated Complaint. (D.E.17). The motion to dismiss was granted in part on July 14, 2005, but Plaintiff was permitted to file an amended complaint. (D.E.42). Plaintiff filed an amended complaint on August 8, 2005. Thereafter, Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint on July 14, 2005 pursuant to Fed.R.Civ.P. 12(b)(6). (D.E.46).

FN1. An order granting dismissal as to defendant William Kohnke was issued on July 14, 2005 for Plaintiff's failure to show good cause as to why service of process had not been perfected. (D.E.41). In his Amended Complaint, Plaintiff does not raise any claims against William Kohnke.

II. LEGAL STANDARD

Dismissal is appropriate where it is clear the plaintiff can prove no set of facts in support of the claims in the complaint. Accordingly, the court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.

Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1774 (11th Cir.1993) (citations omitted). "In ruling on the motion to dismiss the district court must accept the well pleaded facts as true and resolve them in the light most favorable to the plaintiff." *St. Joseph's Hosp., Inc. v. Hosp. Corp. Of America*, 795 F.2d 948, 954 (11th Cir.1986).

The Federal Rules of Civil Procedure do not require a claimant to set out in detail all the facts upon which the claim is based. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However, the Eleventh Circuit Court of Appeals

holds plaintiffs to a heightened pleading standard in order to survive a motion to dismiss on a 42 U.S.C. § 1983 claim against an official in his individual capacity. *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1368 (11th Cir.1998). Accordingly, "[m]ore than mere conclusory notice pleading is required.... [A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir.1984). The United States Supreme Court has ruled, however, that "municipalities do not enjoy immunity from suit-either absolute or qualified-under § 1983." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 149, 166 (1993). As a result, there is no heightened pleading requirement for Section 1983 claims against municipality defendants. *Id.*

III. ANALYSIS

Count I-Ken Jenne in his Official Capacity as Broward County Sheriff

a. Section 1983

***2** Plaintiff sues Jenne in his official capacity as Sheriff of Broward County, essentially constituting a suit against the County. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Since municipalities do not enjoy immunity under Section 1983 claims, the heightened pleading requirement does not apply to Defendant Jenne. *Leatherman*, 507 U.S. at 166. The Supreme Court has ruled that in order to state a Section 1983 claim against a municipal defendant, the plaintiff must allege the existence of a municipal policy or custom which resulted in the deprivation of specific federal constitutional or statutory rights. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In Count I of his Amended Complaint, Plaintiff alleges investigations against him pursuant to the Broward County Sheriff's Office ("BSO") Policy and Procedure Manual ("PPM"). (D.E.43, ¶¶ 22, 25, 28). While Plaintiff does allege the existence of a municipal policy, he fails to allege a causal connection between the policy and the alleged violation of his federal constitutional and statutory rights. Plaintiff does allege that "[t]he PPM followed in the assigning of the reported complaints against Plaintiff, investigative process and scheme employed by BSO was constitutionally infirm...." (D.E.43, ¶ 25). However, Plaintiff then alleges that his termination was not a result of the PPM and, therefore, not policy related. Specifically, in his Amended Complaint, Plaintiff alleges that BSO acted "[c]ontrary to the PPM," by including additional charges against Plaintiff. (D.E.43, ¶ 22). He further alleges that he was not discharged because of violating the PPM, as Defendants argue, but as a result of racial and sexual discrimination. (D.E.43, ¶ 28). Clearly, if Plaintiff believes he was terminated for discriminatory reasons outside of the PPM, it cannot be alleged that it was a result of an accepted municipal policy. Plaintiff's allegations demonstrate that the alleged harmful conduct was not policy related, and therefore, Plaintiff is unable to establish a *prima facie* case under Section 1983. As a result, it is unnecessary to determine whether there was a deprivation of Plaintiff's federal constitutional or statutory rights.

b. Section 1981

In *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir.2000), the Eleventh Circuit Court of Appeals noted that in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 733, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the U.S. Supreme Court refused to find in Section 1981 "an implied cause of action against state actors because Congress had clearly established § 1983 as the remedial scheme against state actors .... § 1981(c) makes clear that the section creates a right that private or state actors may violate but does not itself create a remedy for that violation." *Butts*, 22 F.3d at 894. Section 1981 is merely the origin of rights enforceable only through the cause of action created by Section 1983 . *Id.* Therefore, in order to state a cause of action under Section 1981, a cause of action must be stated under Section 1983. Here, Plaintiff's claims

against Sheriff Jenne in his official capacity do not state a cause of action under Section 1981 for the same reasons as discussed under Section 1983.

c. The Retaliation Claim

***3** Plaintiff alleges that as a result of complaints made to BSO regarding sexual and racial discrimination, that in retaliation, he was terminated in violation of his rights under 42 U.S.C. § 2000e *et seq.*[FN2] (D.E.43, ¶ 29). Under Title VII, it is unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). When alleging a Title VII claim, the ordinary rules for assessing the sufficiency of a complaint apply. *Swierkiewicz v. Sorema*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Federal Rule of Civil Procedure 8(a) requires only that the complaint give respondent fair notice of the basis for petitioner's claims. *Id.* To state a *prima facie* case for retaliation, a plaintiff must first show that he engaged in statutorily protected activity. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir.1998). In this case, the complaint fails to state a *prima facie* case.

> FN2. It should be noted that while Plaintiff's Amended Complaint seems to infer that a promotional discrimination claim is brought against Defendants, and Defendants indeed address the issue in their motion to dismiss, Plaintiff, in his response, makes clear that no promotional discrimination claim is presented in his Amended Complaint. (D.E.55, p. 11).

In his Amended Complaint, Plaintiff simply alleges that he was terminated because he complained about the alleged discrimination. (D.E.43, ¶ 29). The only details that Plaintiff provides pertain to two instances where he was bypassed for promotional opportunities. Otherwise, there is no mention as to whom Plaintiff complained to, when the complaints were made, and what the complaint specifically stated. In the absence of such detail, Plaintiff fails to allege that his termination was a result of his engagement in statutorily protected activity that resulted in an adverse employment action, and as a result, has not raised a *prima facie* case for a retaliation claim. Unlike the situation in *Swierkiewicz v. Sorema*, where the plaintiff "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with this termination," which the U.S. Supreme Court held "gave respondent fair notice of what petitioner's claims are and the grounds upon which they rest," Plaintiff's allegations are insufficient to put Defendant on notice of the claims against it and Plaintiff therefore fails to state a claim under Title VII. *See Swierkiewicz*, 534 U.S. at 514. Plaintiff was previously cautioned by this Court and advised of this same deficiency yet once again failed to adequately plead a cause of action. The undersigned must therefore conclude that Plaintiff is simply unable to present facts which would support his claims.

d. The Constitutional Claims

Plaintiff alleges that BSO's disciplinary procedures violated Plaintiff's First Amendment rights under the U.S. Constitution. (D.E.43, ¶ 5). In order to bring a First Amendment claim, Plaintiff must demonstrate a reasonable belief that "he or she 'reasonably believed' that he had to forego what he considered to be constitutionally protected speech in order to avoid the sanctions threatened by the challenged law, regulation, or ordinance." *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 761 (11th Cir.1991). Plaintiff's allegations against Jenne in Count I of his complaint are general, conclusory, and devoid of sufficient detail. When, as here, a plaintiff raises "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts" in a First Amendment claim, they will not be deemed sufficient to prevent dismissal. *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.2003).

***4** Plaintiff further alleges a Fourteenth Amendment violation under the U.S. Constitution as a result of the investigative process which resulted in his termination. (D.E.43, ¶ 25). Where an individual complains that a state lacks adequate procedures for termination or asserts that the procedure was not fair and impartial, only procedural due process issues are raised. *See McKinney v. Pate,* 20 F.3d 1550, 1559 (11th Cir.1994). In Florida, a plaintiff must allege a property interest in his position in order to establish entitlement to any procedural due process safeguards. *Depaola v. Town of Davie,* 872 So.2d 377, 379 (Fla. 4th DCA 2004). Plaintiff's complaint wholly fails to allege same. In fact, "[p]ersonnel appointed by a sheriff, including deputy sheriffs and correctional officers, are 'at will' employees." *McRae v. Douglas,* 644 So.2d 1368, 1373 (Fla. 5th DCA 1994). As an 'at will' employee under Florida law, Plaintiff can be terminated for any or no reason, and therefore has no property right in his employment. *See Walton v. Health Care Dist. of Palm Beach County,* 862 So.2d 852, 855 (Fla. 4th DCA 2003). As a result, Plaintiff's claims are insufficient to allege a deprivation of due process rights, since no property interest under Florida law is at stake. For the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's claim against Sheriff Jenne in his official capacity (Count I) is GRANTED.

Count II-Carol E. Dansky

Defendant Dansky asserts that she is entitled to absolute immunity from suit under Fla. Stat. § 768.28(9)(a) (1985). (D.E.46, p. 10). This statute allows immunity from suit for agents of the state or any of its subdivisions sued in their individual capacities absent allegations that the defendants "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. § 768.28(9)(a) (1985). This Court has previously ruled that due to Dansky's employment with BSO, Florida Statute Section 768.28(9)(a) is applicable to her liability in this suit. (D.E.42, p. 11).

In his original complaint, Plaintiff failed to allege bad faith or wanton and willful disregard of human rights on the part of Defendant Dansky. As a result, this Court ruled that Defendant Dansky was immune from suit in her individual capacity. (D.E.42). Plaintiff again fails to allege bad faith or wanton and willful disregard of human rights on the part of Defendant Dansky, therefore, she remains entitled to absolute immunity from suit under Florida Statute Section 768.28(9)(a). The undersigned therefore concludes that no such facts exist to support Plaintiff's claim. As a result of the finding that Defendant Dansky is entitled to absolute immunity, the issue as to whether she is also entitled to qualified immunity, and Plaintiff's constitutional and Title VII claims need not be reached. Defendants' Motion to Dismiss Plaintiff's claim against Carol E. Dansky in her individual capacity (Count II) is GRANTED.

IV. CONCLUSION

***5** For the reasons set forth above, it is hereby ORDERED:

(1) The Defendant's motion to dismiss Plaintiff's claim against Broward County Sheriff Ken Jenne in his official capacity (Count I) is GRANTED WITH PREJUDICE;

(2) The Defendant's motion to dismiss Plaintiff's claim against Carol E. Dansky in her individual capacity (Count II) is GRANTED WITH PREJUDICE;

(3) All pending motions are DENIED AS MOOT.

(4) Defendant shall be entitled to recover its statutorily permitted costs upon filing a timely motion.

DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida, this *21st* day of November, 2005.

S.D.Fla.,2005.
Brooks v. Jenne

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