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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CRISPIN M. AYUYU, **Plaintiff,** **vs.** **MELCHOR A. MENDIOLA, ARVIN C. OGO, AND THE MUNICIPALITY OF ROTA,** **Defendants.**	**CIVIL ACTION NO. 12-0051** **ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER came before the Court on September 19, 2012 at 9:00 a.m. in Courtroom 202A on the defendants' motion to dismiss. David W. Lochabay, Esq., appeared on behalf of defendants Melchor A. Mendiola ("Mayor Mendiola"), Arvin C. Ogo ("Ogo"), and the Municipality of Rota (collectively, "Defendants"). Ramon K. Quichocho, Esq., appeared on behalf of plaintiff Crispin M. Ayuyu ("Plaintiff" or "Ayuyu").

Based on the papers submitted and oral arguments of counsel, the Court hereby **GRANTS In Part** Defendants' motion to dismiss.

II. BACKGROUND[1]

This matter involves the discharge of Plaintiff from his former position as the Resident Department Head of the Rota Department of Public Health. On January 11, 2010, Mayor Mendiola appointed Plaintiff as Acting Resident Department Head for the Rota Department of Public Health, and Plaintiff was subsequently confirmed by the Rota Municipal Counsel.

[1] The following facts are taken from Plaintiff's complaint.

Effective February 24, 2010, Plaintiff became the Resident Department Head, not to exceed the mayor's term up to January 10, 2015. On July 19, 2011, Mayor Mendiola suffered a "mental disability" that rendered him unable to discharge his duties as mayor. As a result, Ogo immediately stepped in as the acting mayor. NMI Const. art. 6, § 7(a)(4). On the following day, Ogo terminated the employment of Plaintiff without consulting the Secretary of the Department of Public Health.

On February 24, 2012, Plaintiff filed a five-count complaint against Defendants based on retaliatory discharge in violation of public policy, breach of contract, and a denial of due process. The complaint alleges that Plaintiff was terminated based on two events that occurred in 2011: (1) Plaintiff insisted on using available funds to pay the salaries of the nurses at the Rota Health Center, and (2) Plaintiff refused to hire Mayor Mendiola's very close associate. These two events allegedly angered Mayor Mendiola and prompted him to devise a plan for Ogo to become "Acting Mayor" and then to terminate Plaintiff.

III. LEGAL STANDARD

The Commonwealth follows the notice pleading standard governed by NMI R. Civ. P. section 8(a) that requires a complaint to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[2] A complaint or pleading is subject to dismissal where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable legal theory. *Bolalin v. Guam Publications, Inc*., 4 NMI 176 (1994). In deciding a motion to dismiss, the court must assume the truth of all factual allegations in the challenged pleading

[2] This Court applies the notice pleading standard as set forth in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and declines to adopt the *Twombly*/*Iqbal* plausibility standard as urged by Defendants. The CNMI Supreme Court adopted the *Conley* standard, and used it even after *Twombly* was decided. *See Camacho v. Micronesian Dev. Co*., 2008 MP 8 ¶ 10 ("Under Rule 12(b)(6), '[d]ismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (quoting *Govendo v. Micronesian Garment MFG*., 2 NMI 270, 283 (1991)). The Court agrees with Defendants that the *Conley* and *Twombly* standards cannot be reconciled and "*Twombly* and *Iqbal* have ushered in a new era." (Def.'s Reply at 1, 2.) Although this Court may look to federal interpretation of CNMI's analogous rules and also apply United States common law "in the absence of written law or local customary law to the contrary," 7 CMC § 3401, it cannot adopt entirely different federal rules or standards as Defendants propose. If the CNMI Supreme Court decides to depart from the *Conley* standard in favor of *Twombly*/*Iqbal*, which it is currently considering in its pending case of *Syed v. Mobile Oil Mariana Islands, Inc*., then this Court will so follow. However, until that time, the applicable standard is *Conley* as this Court is obliged to follow CNMI Supreme Court precedent.

and construe them in the light most favorable to the non-moving party. *Zhang Gui Juan v. Commonwealth*, 2001 MP 18 ¶ 11; *Govendo v. Marianas Pub. Land Corp*., 2 NMI 482, 490 (1992). The complaint must provide legal and factual support for each element of its legal theories. *Cepeda v. Hefner*, 3 NMI 121, 127 (1992).

IV. DISCUSSION

A. COUNTS I AND II: RETALIATORY DISCHARGE IN VIOLATION OF PUBLIC POLICY

Plaintiff alleges Defendants unlawfully discharged him in retaliation for Plaintiff's (1) insistence on using available funds to pay the nurses' salaries at the Rota Health Center (Count I), and (2) refusal to hire Mayor Mendiola's "very close friend" (Count II). (Compl. ¶¶ 21-24, 55.) With respect to Count I, Plaintiff alleges he urged Mayor Mendiola to use available funds to pay the nurses' salaries at the Rota Health Center. (*Id*. ¶¶ 38-40.) However, Mayor Mendiola denied the existence of available funds because he was allegedly reserving the funds "for his pet projects, travel, and other nonessential purposes." (*Id*. ¶ 23.) In order to protect his misuse of public funds, Mayor Mendiola collaborated with Ogo to terminate Plaintiff who was "planning to bring the issues before the appropriate authorities, including the Office of Attorney General and the Office of the Public Auditor." (*Id*. ¶ 47.) With respect to Count II, Plaintiff refused to hire Mayor Mendiola's "very close associate" because there were more qualified applicants, and "[t]his angered Defendant Melchor." (*Id*. ¶¶ 19-20.)

In order to assert a viable claim for wrongful discharge in violation of public policy, Plaintiff must prove:

> (1) there is a clear public policy[3] (clarity element); (2) discouraging the conduct in which he or she engaged would jeopardize the public policy (jeopardy element); (3) the public-policy-linked conduct caused the dismissal (causation element); and (4) there is no overriding justification for the dismissal (absence of justification element).

Sablan v. Manglona, Civ. No. 04-0166 (NMI Super. Ct. Feb. 27, 2006) (Order Granting Defendants' Motion for Judgment on the Pleadings on the Issue of Wrongful Termination at 4)

[3] The source of public policy for a wrongful termination action based on a violation of public policy must derive from constitutional or statutory authority. *Green v. Ralee Engineering Co*., 960 P.2d 1046, 1048 (Cal. 1998) (citing *Gantt v. Sentry Ins*., 824 P.2d 680, 684-86 (Cal. 1992)).

(reconsidered on other grounds)) (citing *Hubbard v. Spokane County*, 50 P.3d 602, 606 (Wash. 2002) and *Greeley v. Miami Valley Maintenance Contractors, Inc*., 551 N.E.2d 981 (Ohio 1990)). The first, second and fourth prongs of the wrongful discharge causes of action are easily met.

Both Counts I and II claim that Mayor Mendiola and Ogo violated clear public policies, which are embedded in the Government Ethics Code and are designed to curb the misuse of public office and funds for private gain. 1 CMC §§ 8501 *et seq*. Specifically, their alleged acts implicate 1 CMC sections 8531, 8532(a), 8532(b), 8534(a), 8540, and 8102(b). The second prong is also satisfied because Plaintiff engaged in conduct aimed at protecting the public interest for which he was allegedly fired. Lastly, there is no apparent overriding justification for Plaintiff's dismissal, satisfying the fourth prong.

The determination under the third prong whether Plaintiff's "public-policy-linked conduct caused dismissal" is slightly more murky because Plaintiff offers mostly bald assertions on this issue. However, under the applicable legal standard for a motion to dismiss, the complaint provides sufficient factual support that Mayor Mendiola and Ogo terminated Plaintiff in retaliation for his public-policy-linked conduct. Plaintiff's termination occurred soon after he engaged in the conduct displeasing to Mayor Mendiola, and Plaintiff's termination occurred in an unusual manner (Ogo terminated Plaintiff as "Acting Mayor" one day after Mayor Mendiola suffered from a "mental disability," and there was no consultation with the Secretary of the Department of Public Health as prescribed by law[4]). Plaintiff has stated a viable claim for retaliatory discharge in violation of public policy.[5]

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[4] *See infra* p. 13.

[5] Although Plaintiff is an at-will employee, he may not be terminated in violation of an important public policy. *See, e.g, Shiprit v. STS Enterprises, Inc*., Civ. No. 99-0490 (NMI Super. Ct. Dec. 13, 1999) (Order Granting Defendant's Motion to Dismiss at 4) ("[T]he public policy exception to the at-will doctrine permits an at-will employee to recover for wrongful discharge upon a finding that the employer's conduct undermined an important public policy." (quoting *Huey v. Honeywell, Inc*. 82 F.3d 327, 331 (9th Cir. 1996)).

Nevertheless, Defendants contend that Plaintiff is not entitled to relief for Counts I and II as against Mayor Mendiola and Ogo who (1) are protected by qualified immunity,[6] and (2) are improper defendants because a common law retaliatory discharge claim may be brought against only the employer (the Municipality of Rota).

1. Defendants Mayor Mendiola And Ogo Are Entitled To Qualified Immunity For Count II But Not For Count I.

"[G]overnment 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) (citations omitted). In determining whether a defendant is entitled to qualified immunity, the court must make two inquiries: (1) "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officers violated a constitutional right[,]" and (2) was the right "clearly established" to the extent that a reasonable person in the officer's position would know that the conduct complained of was unlawful. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The issue of qualified immunity is a legal question for the trial court. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

a. Count I – Plaintiff's Report of Misuse of Public Funds

In construing the facts most favorably to Plaintiff, the facts show a clear infringement of Plaintiff's First Amendment right to free speech.[7] NMI Const. art. I, § 2.[8] Plaintiff was discharged allegedly because he expressed concern about the use of available public funds. (Compl. ¶ 41.). These statements relate to a matter of public concern and, thus, are constitutionally protected. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *see, e.g., Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 425 (9th Cir. 1995) ("[W]e have stated that

[6] The Municipality of Rota cannot claim qualified immunity because "[t]here is no qualified immunity for local government." *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

[7] Although Plaintiff did not expressly assert a First Amendment violation, the substance for one is clearly laid out in the complaint, which is sufficient in a motion to dismiss with a legal standard highly favorable to Plaintiff.

[8] The CNMI Constitution provides the same standard of protection for speech rights as the First Amendment to the U.S. Constitution. *Commonwealth v. Evangelista*, Crim. Case No. 93-174 (NMI Super. Ct. Oct. 11, 1994) (Decision and Order on Defendant's Motion to Close Courtroom and Seal Records at 4, n.3).

misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern."). The fact that Plaintiff reported the misuse of public funds *privately* to Mayor Mendiola rather than in a public forum does not shed the statements of their constitutional protection. *See Ghivan v. Western Line Consolidated Sch. Dist*., 439 U.S. 410, 415-16 (1979) (holding that First Amendment protection applies when a public employee protests privately to her employer regarding allegedly racially discriminatory policies); *Thomas v. City of Beaverton*, 379 F.3d 802, 810 (9th Cir. 2004) ("Speech about a matter of public concern may be protected even when made in a private context.").

Having determined the first part of the qualified immunity analysis in favor of Plaintiff,[9] the Court next considers whether at the time Plaintiff was discharged it was clearly established that it is unlawful to discharge a public employee for reporting a misuse of public funds. "'Clearly established law' is law that is sufficiently established so as to provide public officials with 'fair notice' that the conduct alleged is prohibited." *Randall v. Scott*, 610 F.3d 701, 715 (11th Cir. 2010) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). Defendants contend that Plaintiff cannot prove Mayor Mendiola's and Ogo's conduct was clearly prohibited by law because "the Commonwealth has no body of law or precedent" regarding "retaliatory discharge against public policy" and "the employment rights of a discharged mayoral/gubernational appointee." (Def.s' Mot. to Dismiss at 3.) Plaintiff responds by pointing to two cases[10] of questionable precedential value and relevance, which supposedly provide guidance on retaliatory discharge claims in the Commonwealth. (Pl.'s Opp'n. at 6.)

A law may be clearly established even if there is no local precedent declaring the action in question to be unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("This is not to

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[9] The Court finds that the complaint provides sufficient factual support to show a violation of Plaintiff's First Amendment right to free speech for the sole purpose of denying Defendants qualified immunity. Plaintiff has not, however, proven a First Amendment violation upon which he is entitled to relief. To do so, Plaintiff would have to additionally demonstrate that his interest in commenting on the matters of public concern outweighs the Commonwealth's interest in promoting efficiency. *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968). At this early stage in the proceedings it is unnecessary to analyze the balancing test since all facts shall be construed most favorably towards Plaintiff. *See Saucier*, 533 U.S. at 201.

[10] *Chung v. World Corp*., 2005 WL 1459674 and *Miller v. Saipan Portopia Hotel Corp*., 1996 WL 805035.

say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."). The inquiry of whether a constitutional right is clearly established begins with "decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991).

Although Defendants are correct in asserting that the CNMI has little, if any, case law on claims for retaliatory discharge against public policy, there is ample case law from the U.S. Supreme Court and the circuit courts holding that it is unlawful to discharge a public employee[11] in retaliation for speaking out on issues of public concern. *Southern Cal. Rapid Transit Dist. V. Superior Court*, 30 Cal. App. 4th 713, 731 (Cal. Ct. App. 1994) ("[I]t [is] established beyond any reasonable dispute that an adverse employment decision by a governmental agency based upon constitutionally protected speech by the employee violates the First Amendment." (citing *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) and *Connick*, 461 U.S. at 142)); *see also*, *e.g.*, *Hoover v. Radabaugh*, 307 F.3d 460, 469 (6th Cir. 2002) ("A reasonable official would know that terminating an employee with the motivation, even in part, of quieting the plaintiff's public speech about illegal activities of the Department violates the Constitution."); *Warnock v. Pecos County*, 116 F.3d 776, 782 (5th Cir. 1997) ("First Amendment law . . . clearly established that county officials may not terminate a county auditor for diligently monitoring county finances and speaking out about genuine fiscal problems."); *Holder v. City of Allentown*, 987 F.2d 188, 200 (3d Cir. 1993). The Court finds that Mayor Mendiola and Ogo are not entitled to qualified immunity for Count I because they violated a clearly established constitutional right that protects employees against adverse employment action for speaking out on issues of public concern.

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[11] The United States Supreme Court has consistently held that public employees who are "employees at will with no legal entitlement to continued employment" may maintain a cause of action for retaliatory discharge in violation of their First Amendment rights to free speech. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980).

b. Count II – Plaintiff's Refusal to Hire Mayor Mendiola's Favored Applicant

Defendants argue that Mayor Mendiola and Ogo are entitled to qualified immunity for Count II. Plaintiff asserts no violation of a constitutional right, and none is readily apparent to the Court. Although Mayor Mendiola and Ogo may have violated a public policy,[12] there is no allegation or evidence that they violated a clearly established constitutional right that would deny them of qualified immunity. *Cf. Rappa v. Hollins*, 991 F. Supp. 367, 383 (D. Del. 1997) ("At the time of the defendants' defamatory comments, it was not clearly established that [plaintiff] had a constitutional right not to be subjected to defamatory remarks in retaliation for engaging in constitutionally protected First Amendment activity."). Therefore, Mayor Mendiola and Ogo are entitled to qualified immunity for Count II.

2. Plaintiff Has A Viable Retaliatory Discharge Claim Against *All* Named Defendants.

Plaintiff is a government employee employed by the Municipality of Rota. *See Sablan*, Civ. No. 04-0166 (Order Granting Defendants' Motion for Judgment on the Pleadings on the Issue of Wrongful Termination at 4-5) (citing 1 CMC § 8152). There is a split of authority as to whether a common law claim for retaliatory discharge in violation of public policy may be brought against only the employer or also against any supervisor or employee involved in the wrongful termination. *Jasper v. H. Nizam, Inc*., 764 N.W.2d 751, 775 (Iowa 2009). Defendants argue that the Court should follow the cases that hold a wrongful discharge claim may be brought against only the employer, reasoning that "[t]he CNMI cannot have a situation where government supervisors and employees are afraid to carry out direct orders from their supervisors for fear of individual liability." (Defs.' Reply at 5.) Plaintiff responds by citing *Jasper*[13] and Restatement (Third) of Agency § 7.01 (2006) for the general rule that "[a]n agent is subject to liability to a third party harmed by the agent's tortious conduct."

[12] "[I]t is the policy of the Commonwealth that the personnel system hereby established be applied and administered in accordance with the following merit principles: . . . (b) Impartial selection of the ablest person for government service by means of competitive tests which are fair, objective, and practical." 1 CMC § 8102(b).

[13] The Iowa Supreme Court held that "an individual corporate officer can be liable for the tort [of wrongful discharge from employment]." *Jasper*, 764 N.W.2d at 775.

Wrongful discharge based on a violation of public policy is an intentional tort. *See, e.g.*, *Smith v. Atlas Off-Shore Boat Serv., Inc*., 653 F.2d 1057, 1064 (5th Cir. 1981); *Berry v. Liberty Holdings, Inc*., 803 N.W.2d 106, 109 (Iowa 2011); *Fingerhut v. Children's Nat'l Med. Ctr*., 738 A.2d 799, 803 (D.C. 1999); *Scott v. Otis Elevator Co*., 572 So. 2d 902, 903 (Fla. 1990); *Cagle v. Burns and Roe, Inc*., 726 P.2d 434, 436 (Wash. 1986). "Tort law . . . concerns liability imposed by society for acts by individuals deemed to be undesirable in society . . . [and] seeks to encourage responsibility for individual behavior." *Jasper*, 764 N.W.2d at 776. Some jurisdictions, as cited by Defendants, depart from this general principle by granting immunity to the individual officer who wrongfully discharged an employee. *Id*. at 775. The reasoning is that "an individual officer or employee of a corporation cannot commit the tort of wrongful discharge because an individual officer or employee has no authority separate from the authority exercised on behalf of the corporation to discharge an employee of the corporation." *Id*.

On the other hand, some courts still adhere to the general rule of holding tortfeasors individually liable even in the context of wrongful discharge claims. *Ballinger v. Del. River Port Auth*., 800 A.2d 97, 110 (N.J. 2002) ("[A]n individual who personally participates in the tort of wrongful discharge may be held individually liable."); *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 699 (W. Va. 1982) ("An agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship." (quotation omitted)); *Higgins v. Assmann Elecs., Inc*., 173 P.3d 453, 458 (Ariz. Ct. App. 2007) ("Generally, any person is charged with responsibility for his own torts." (citation omitted)). *Jasper*, *Ballinger*, *Harless* and *Higgins* all held that the individual employees who actively participated in the wrongful termination of the plaintiffs were liable in addition to the employers. The holdings rely on the restatements of agency that assert "[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal." *See, e.g., Ballinger*, 800 A.2d at 110 (quoting Restatement (Second) of Agency § 343 (1958)).

This Court agrees with the line of cases that decline to insulate individual wrongdoers from liability simply because they committed the tort of wrongful termination on behalf of their employers. The Commonwealth adheres to "the rules of the common law, as expressed in the restatements of the law." 7 CMC § 3401. The restatements are very clear that agents are individually liable for their torts even when committed within the scope of employment. Restatement (Third) of Agency § 7.01 (2006). Also, holding supervisors or employees liable when they are responsible for the wrongful discharge of an employee best comports with the policies of tort law. *Jasper*, 764 N.W.2d at 776 ("Our tort laws should be applied to encourage responsible behavior for all individuals, not insulate unwanted conduct by individuals based on the legal fiction of a [government agency] as an independent entity."); *Buckner v. Atlantic Plant Maintenance*, 694 N.E.2d 565, 574 (Ill. 1998) (Freeman, C.J., concurring in part and dissenting in part) ("Also, contrary to the majority, I agree with the public policy that holding the 'active wrongdoer' liable, in addition to the former employer, promotes the deterrent goal of the tort.") (citations omitted)).

The instant case presents circumstances under which it is particularly just to hold Mayor Mendiola and Ogo responsible for the alleged unlawful discharge of Plaintiff. Mayor Mendiola is entrusted with complete power and control over personnel decisions. *See* 1 CMC §§ 5106(h), (i). He did not simply "carry out direct orders from [his] supervisors" to fire Plaintiff as inferred by Defendants, (Defs.' Reply at 5); he personally made and executed the order, in collaboration with Ogo, to fire Plaintiff. In the context of personnel matters, it is a legal fiction to call the Municipality of Rota and the mayor separate entities. *Cf. Ray v. City of Bossier City*, 859 So. 2d 264, 272-73 (La. Ct. App. 2003) (holding that Chief Dison and Bossier City were both plaintiffs' "employer" because "Chief Dison had the power to employ or terminate them from the Bossier City Police Department"); *but cf. Buckner*, 694 N.E.2d at 569 ("[T]he power to hire and fire employees is ultimately possessed only be the employer. Consequently, the tort of retaliatory discharge may be committed only by the employer. The agent or employee who carries out the employer's decision to fire will not be subject to personal liability for retaliatory discharge.").

The Commonwealth Superior Court in *Sablan* was presented with the question: can the tort of wrongful termination be brought against a supervisor rather than the employer? *Sablan*, Civ. No. 04-0166 (Order Granting Defendants' Motion for Judgment on the Pleadings on the Issue of Wrongful Termination at 5-6). The court answered in the negative, noting that "[c]ourts that have allowed suits against a supervisor have done so only where statutes explicitly provided for suits against supervisors." *Id*. (citing *Palmer v. Regents of University of California*, 107 Cal. App. 4th 899, 909 (Cal. App. 2003)). This Court disagrees with that holding and reasoning because there is ample legal support from case law, the restatements, and policy considerations to hold supervisors liable when they actively participate in the wrongful termination of an employee. *See supra* pp. 9-10. Also, the Commonwealth Superior Court had previously held that the Rota Municipal Council ***and*** certain Council members were jointly liable for a wrongful discharge claim pursuant to 42 U.S.C. § 1983. *Atalig v. Rota Municipal Council*, Civ. No. 04-0012 (NMI Super. Ct. May 9, 2005) (Findings of Fact and Conclusions of Law).

Mayor Mendiola held sole responsibility for determining whether to discharge Plaintiff, which he allegedly transferred to Ogo by feigning a "mental disability," and then directed Ogo to discharge Plaintiff. Thus, Mayor Mendiola and Ogo actively participated in the termination of Plaintiff. Unlike the majority of cases in which supervisors were shielded from liability, Mayor Mendiola and Ogo did not discharge Plaintiff pursuant to orders directed from some other individual or entity. Sound public policy in deterring tortious behavior, the Restatement (Third) of Agency § 7.01 (2006), and those cases that allow wrongful discharge claims to be brought against the supervisors who were personally involved in the employment termination support this Court's ruling that Mayor Mendiola and Ogo may be found individually liable.

B. COUNT III – BREACH OF CONTRACT

Plaintiff and Defendants agree that there is a viable breach of contract claim against only the Municipality of Rota and not against Mayor Mendiola or Ogo in their individual capacities.

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C. COUNT IV – DENIAL OF DUE PROCESS

Plaintiff argues that Defendants denied Plaintiff due process because they terminated him "without any legal justification or factual basis, and in violation of the laws and regulations." (Compl. ¶ 73.) Amendment 25 to the CNMI Constitution required Mayor Mendiola and/or Ogo to consult with the Secretary of the Department of Public Health before terminating Plaintiff, which they failed to do. *See* 1 CMC § 5106(i);[14] *Inos v. Tenorio*, Civ. No. 94-1289 (NMI Super. Ct. June 14, 1995) (Memorandum Decision and Declaratory Judgment at 28).[15] Defendants contend, however, that Plaintiff was not entitled to any due process because he was an "at-will" employee with no constitutionally protected property interest in his continued employment. (Def.s' Mot. to Dismiss at 5-6.)

"No person shall be deprived of life, liberty or property without due process of law." NMI Const. art. I, § 5; U.S. Const. amend. XIV. Plaintiff must demonstrate that he held a property interest in his previous employment as Resident Department Head of the Rota Department of Public Health, and he was terminated without being afforded due process. *Palka v. Shelton*, 623 F.3d 447, 452 (7th Cir. 2010) ("To plead a procedural due-process claim,

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[14] The statute discusses the procedure only for appointing resident department heads but not for removing them. However, it is a well established principle of law that when "the removal is not governed by a constitutional or statutory provision . . . the power of removal is incident to the power to appoint." 63A Am. Jur. 2d *Public Officers and Employees* § 221.

[15] The CNMI Superior Court thoroughly analyzed the historically conflicting relationship between the Commonwealth's central government and its local authorities. The original 1976 Constitution limited the power of the local governments of Saipan, Tinian, Rota and Aguigan. *Id*. at 3. Although each of these islands were provided elected mayors, their roles were largely that of "a local advisor to the governor." *Id*. at 3-4. However, Amendment 25 and the delegates in the 1985 Constitutional Convention bestowed a much greater amount of discretion and authority upon the mayors in strengthening the local governments and making them more efficient. *Id*. at 4-5. With respect to control over personnel in the local governments, the court held:

> Although the mayors must consult the department secretaries prior to making an appointment, the consultation requirement will be satisfied when a mayor has given a secretary of the department an opportunity to express written recommendations, criticisms and views prior to that mayor's appointment decision. *See Mid-America Regional Council v. Mathews*, 416 F. Supp. 896, 904 (D.C. Mo. 1976) ("consultation" defined as deliberating, seeking advice and opinion, and applying for information). ***Likewise, a mayoral dismissal of a resident department head must occur in a similar manner.***

Id. at 28 (emphasis added).

[plaintiff] must allege a cognizable property interest, a deprivation of that interest, and a denial of due process."). It is undisputed that Plaintiff was terminated without due process. The only issue is whether he held a property interest in his job.

"Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement of those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). "To determine whether [plaintiff] had a property interest in continued employment, we ask if he had a legitimate expectation, based on rules (statutes or regulations) or understandings (contract, expressed or implied) that he would continue in his job." *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Ct. App. 1988). For example, employment predicated on satisfactory performance or which may not be terminated except for just cause, have a legitimate expectation of continued employment. *Id*. On the other hand, employees "who are terminable at will have no property interest because there is no objective basis for believing that they will continue to be employed indefinitely." *Id*.

Plaintiff was an at-will employee who served at the mayor's pleasure. Therefore, he had no property interest in his continued employment. Amendment 25, which requires the mayor to consult with the Secretary of Public Health prior to terminating a department head, does not entitle Plaintiff to due process proceedings nor create an objective basis that Plaintiff would be employed indefinitely. Due process is "notice and opportunity for hearing." *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950). Amendment 25 does not mention anything about affording department heads with notice or a hearing before being removed. Furthermore, "consultation" merely means that the mayor must "seek[] advice and opinion" from the Secretary of Public Health[16] but not necessarily consent.[17] *But cf.* NMI

[16] *Inos v. Tenorio*, Civ. No. 94-1289 (NMI Super. Ct. June 14, 1995) (Memorandum Decision and Declaratory Judgment at 28) (citing *Mid-America Regional Council v. Mathews*, 416 F. Supp. 896, 904 (D.C. Mo. 1976)).

[17] Plaintiff asserts that "a Resident Department Head may not be so removed without the concurrence of the Municipal Council that was required by constitution to confirm the appointment." (Pl.'s Brief at 4) (citing NMI Const. art. VI, § 7(a)(3) ("The powers of the municipal councils . . . shall include the following: . . . 3) To confirm all resident department heads which are stationed on their island or islands.")). This constitutional provision, however, does not provide Plaintiff due process, or notice and a hearing before termination, and it does not alter Plaintiff's at-will employment status. Even if NMI Const. art. VI, § 7(a)(3) or Amendment 25 could be construed

Const. art III, § 11 ("The governor shall appoint an Attorney General with the advice ***and consent*** of the Senate.") (emphasis added). The mayor has full discretion and authority to terminate department heads with or without cause; therefore, Plaintiff was not entitled to due process prior to termination.

D. COUNT V – CONSPIRACY

Plaintiff contends that "Defendants [Mayor Mendiola and Ogo] maliciously and for an improper purpose of depriving Plaintiff his employment benefits, conspired with one another to terminate Plaintiff's employment even without prior consultation with the Secretary of the Department of Public Health." (Compl. ¶ 82.) In other words, Plaintiff argues that Mayor Mendiola and Ogo conspired to terminate Plaintiff without affording him due process. As discussed above, Plaintiff was an at-will employee with no right to due process. Therefore, Count V fails as a matter of law.

V. CONCLUSION

For the forgoing reasons, Defendants' motion to dismiss is hereby **GRANTED In Part**. Count II (Retaliatory Discharge in Violation of Public Policy) is hereby DISMISSED as to Mayor Mendiola and Ogo because they are protected by qualified immunity. Counts IV (Denial of Due Process) and V (Conspiracy) are hereby DISMISSED because Plaintiff was not entitled to due process or, alternatively, Mayor Mendiola and Ogo are protected by qualified immunity.

Count I (Retaliatory Discharge in Violation of Public Policy) shall REMAIN as against all Defendants. Count II (Retaliatory Discharge in Violation of Public Policy) shall REMAIN against only the Municipality of Rota. Count III (Breach of Contract) shall REMAIN as against only the Municipality of Rota.

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as entitling Plaintiff to due process, Mayor Mendiola and Ogo would still be protected by qualified immunity because it is not clearly established that Plaintiff, as an at-will employee, must be afforded due process prior to termination. *See supra* pp. 12-13; *see* (Pl.'s Brief at 2) ("[A] Resident Department Head's removal is not governed by a constitutional or statutory provision.").

IT IS SO ORDERED this 14th day of November, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge