



By order of the Court, GRANTED. Presiding Judge Robert C. Naraja

FOR PUBLICATION



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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 DEFENDANTS'
MOTION FOR PARTIAL
SUBSTITUTION OF PARTIES

I. INTRODUCTION

THIS MATTER came before the Court on September 19, 2012 at 9:00 a.m. in Courtroom 202A on Defendants' motion for partial substitution of parties. 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"). Defendants moved to substitute the CNMI Government for Mayor Mendiola and Ogo for Counts 1, 2, and 3 pursuant to the Government Liability Act. 7 CMC § 2201 et seq.

Based on the papers submitted and oral arguments of counsel, the Court hereby GRANTS Defendants' motion for partial substitution.

II. BACKGROUND

On February 24, 2012, Plaintiff filed a five-count complaint, charging all Defendants with Counts 1 and 2 for retaliatory discharge in violation of public policy and only Mayor

1 Mendiola and Ogo with Counts 4 and 5 for Due Process violations.<sup>1</sup> On September 19, 2012,  
2 the Court simultaneously heard oral arguments from counsels on Defendants’ motion to  
3 dismiss and motion for partial substitution of parties. On November 14, 2012, the Court  
4 dismissed Counts 4 and 5 in their entirety because Plaintiff, as an at-will employee, held no  
5 property interest in his continued employment. (Order Granting In Part Defendants’ Motion to  
6 Dismiss at 13-14.) Also, the Court granted Mayor Mendiola and Ogo qualified immunity for  
7 Count 2 because the complaint did not show that a clearly established constitutional right had  
8 been violated for that specific charge. (*Id.* at 8.) As a result, Mayor Mendiola and Ogo remain  
9 in the lawsuit only in Count I.<sup>2</sup>

10 On March 30, 2012, Defendants filed the pending motion to substitute the CNMI  
11 government for Mayor Mendiola and Ogo pursuant to the Government Liability Act. 7 CMC §  
12 2201 *et seq.* Defendants attached to their motion a “Certification of Scope of Employment”  
13 signed by then-Attorney General Edward T. Buckingham which states: “Based on the results of  
14 [an] investigation, I certify that Defendant Melchor A. Mendiola was acting within the scope of  
15 his employment as the Mayor of the Municipality of Rota at the time of the alleged incident  
16 giving rise to the claims of plaintiff in this action.” Mr. Buckingham similarly certified that  
17 Ogo acted within the scope of his employment “as the Acting Mayor/Chairman of Rota  
18 Municipal Council” at the time of the incident in question.

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20 <sup>1</sup> Count 3 (Breach of Contract) in the original complaint was mistakenly alleged against *all* Defendants.  
21 Plaintiff later corrected this oversight in his first amended complaint that alleged Count 3 (Breach of Contract)  
22 against *only* the Municipality of Rota.

22 <sup>2</sup> On November 16, 2012, in response to the Court’s order on Defendants’ motion to dismiss, Plaintiff filed a first  
23 amended complaint (“FAC”), containing:

23 COUNT I (Retaliatory Discharge for Not Helping Defendant Melchor  
24 Hide Available Funds, in Violation of Public Policy) *Against All*  
25 *Defendants*;

25 COUNT 2 (Retaliatory Discharge for Not Hiring Defendant Melchor’s  
26 Favored Choice, in Violation of Public Policy) *Against Defendant*  
27 *Municipality of Rota*; and

27 COUNT 3 (Breach of Contract) *Against Defendant Municipality of Rota*.

28 (FAC at 6-9.) Therefore, Defendants’ motion for partial substitution of parties pertains only to  
Count I.

1 **III. DISCUSSION**

2 In 2006, the CNMI legislature passed Public Law 15-22, entitled as the  
3 “Commonwealth Employees’ Liability Reform and Tort Compensation Act of 2006”  
4 (CELRTCA). Its purpose is to prevent Commonwealth employees from “being unnecessarily  
5 sued in their individual capacities for actions performed as employees of the Commonwealth”  
6 since “the Commonwealth is liable for their actions and no individual liability can attach to the  
7 employee.” 1 CMC § 2201, commission cmt. § 2 (Findings and Purpose). Thus, to prevent  
8 “excessive litigation costs,” Commonwealth employees sued in their individual capacities for  
9 acts committed within the scope of employment are dismissed from the lawsuit and the CNMI  
10 government is substituted as the proper defendant. *See id.*; *see also Osborn v. Haley*, 549 U.S.  
11 225, 229 (2007)<sup>3</sup> (“The [FELRTCA] accords federal employees absolute immunity from  
12 common-law tort claims arising out of acts they undertake in the course of their official  
13 duties.”).

14 **A. MAYOR MENDIOLA AND OGO ACTED WITHIN THE SCOPE OF THEIR EMPLOYMENT.<sup>4</sup>**

15 Plaintiff argues that CELRTCA does not apply because Mayor Mendiola and Ogo did  
16 not act within the scope of their employment when they committed the intentional tort of  
17 wrongfully discharging Plaintiff in violation of public policy. (Pl.’s Opp’n. at 6.) First,  
18 Plaintiff notes that “intentional torts will ordinarily fall outside the scope of employment.” (*Id.*  
19 (citing *Kabir v. CNMI Public School System*, 2009 MP 19 ¶ 44). Second, the four factors in  
20 determining whether an intentional tort falls within the scope of employment “clearly show  
21 that Defendants’ intentional torts was [sic] not within the scope of their employment or office.”  
22 (*Id.* at 7.) Essentially, Plaintiff asserts Defendants’ conduct was dishonest and illegal, and  
23 therefore was not “expectable” or “in furtherance of the Municipality of Rota’s business.” (*Id.*  
24 at 7-8.)

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26 <sup>3</sup> CERLRTCA is nearly identical to the Federal Employees’ Liability Reform and Tort Compensation Act of 1988  
27 (FELRTCA or the “Westfall Act”). Therefore, it is useful to look to the interpretation of FELRTCA. *See In re*  
*Estate of Reyes*, 2012 MP 13 ¶ 17 (citations omitted).

28 <sup>4</sup> The scope of employment issue is for the court to decide. *See Gutierrez de Martinez v. DEA*, 111 F.3d 1148,  
1153 (4th Cir. 1997).

1           The Court agrees that Defendants allegedly committed an intentional tort, which  
2 ordinarily falls outside the scope of employment. However, the Court disagrees with  
3 Plaintiff's application of the four-factor "scope of employment" test. It is insufficient to state  
4 that an employee's conduct fell outside the scope of employment simply because it was  
5 dishonest or illegal or otherwise improper. *See, e.g., Richman v. Straley*, 48 F.3d 1139, 1145  
6 (10th Cir. 1995); *Wegner v. Delly-Land Delicatessen*, 153 S.E.2d 804, 808 (N.C. 1967)  
7 (citations omitted); *Mitchell v. Norman James Const. Co.*, 684 N.E.2d 872, 878 (Ill. Ct. App.  
8 1997). The test for "scope of employment" is very broad and includes all "actions 'reasonably  
9 incident' to an employee's more typical duties." *Coleman v. United States*, 91 F.3d 820, 824  
10 (6th Cir. 1996) (citation omitted). The test is particularly flexible in the context of  
11 governmental immunity cases. *Id.* ("Noting that the Supreme Court has established a flexible  
12 test for establishing the line of duty in governmental immunity cases, and that this line must be  
13 set at the "outer perimeter" of the employee's responsibilities." (citing *Barr v. Matteo*, 360  
14 U.S. 564, 575 (1959)).

15           In determining whether an intentional tort falls within the scope of employment, the  
16 court should consider four factors, including:

17           (1) the conduct was similar to that which the employee was hired to  
18           perform; (2) the action occurred substantially within the authorized spatial  
19           and temporal limits of employment; (3) the action was in furtherance of  
20           the employer's business; and (4) the conduct, though unauthorized, was  
21           expectable in view of the employee's duties.

22           *Kabir*, 2009 MP 19 ¶ 46 (citing cases). Each prong weighs in favor of finding Mayor  
23 Mendiola's and Ogo's conduct fell within the scope of their employment. **First**, Mayor  
24 Mendiola was statutorily assigned "the power and duty to . . . [a]ppoint, supervise and remove  
25 those employees as are provided by law to assist in the performance of mayoral  
26 responsibilities." 1 CMC § 5106(h). Ogo acquired this same power and duty upon becoming  
27 "acting mayor" when Mayor Mendiola supposedly suffered a "mental disability" that rendered  
28 him unable to discharge his duties as mayor. *See* NMI Const. art. VI, § 7(a)(4). Plaintiff's  
cause of action for retaliatory discharge in violation of public policy arose when Ogo, acting at

1 the direction of Mayor Mendiola, carried out his prescribed duty as acting mayor in removing  
2 Plaintiff.

3 **Second**, Plaintiff concedes, or at least offers no evidence to the contrary, that  
4 Defendants discharged him within the authorized spatial and temporal limits of employment.  
5 (Pl.’s Opp’n. at 7); *cf. Martinek v. United States*, 254 F. Supp. 2d 777, 783 (S.D. Ohio 2003)  
6 (“Where a supervisor’s harassment of an employee takes ‘place during work hours, at the  
7 office, and was carried out by someone with the authority to hire, fire, and promote and  
8 discipline the plaintiff, it will normally fall within the supervisor’s scope of employment.”  
9 (citation omitted)). **Third**, the alleged intentional tort was in furtherance of the employer’s  
10 business because it involved removing a dissenting employee.

11 **Fourth**, it is expectable that Mayor Mendiola and Ogo, as an acting mayor, may  
12 exercise their power in removing employees, even in noncompliance with proper procedure or  
13 for unlawful reasons. *See* Restatement (Third) of Agency § 7.07(2) (“An employee acts within  
14 the scope of employment when performing work assigned by the employer or engaging in a  
15 course of conduct subject to the employer’s control.”); *Kabir*, 2009 MP 19 ¶ 45. Even  
16 intentional torts, such as the instant one, may fall within the scope of employment. *Kabir*,  
17 2009 MP 19 ¶ 2 (“CELRTCA covers government employees sued for negligent or wrongful  
18 conduct arising from actions taken within the scope of employment – **including intentional**  
19 **torts** – but that under CNMI law, intentional torts will ordinarily fall outside the scope of  
20 employment.”) (emphasis added); *see Maron v. United States*, 126 F.3d 317, 326 (4th Cir.  
21 1997).

22 Furthermore, the then-Attorney General’s certification that Mayor Mendiola and Ogo  
23 acted within the scope of their employment is prima facie evidence that the Commonwealth is  
24 the sole proper defendant.<sup>5</sup> *Coleman*, 91 F.3d 820, 823 (6th Cir. 1996). As a result, Plaintiff

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26 <sup>5</sup> 7 CMC section 2210(a) provides:

27 Upon certification by the Attorney General that the defendant employee was acting  
28 within the scope of his/her office or employment at the time of the incident out of which  
the claim arose, any civil action or proceeding commenced upon such claim in a court  
against an employee shall be deemed an action against the Commonwealth and the

1 has the burden of proof to demonstrate otherwise. *See Davric Maine Corp. v. United States*  
2 *Postal Serv.*, 238 F.3d 58, 66 (1st Cir. 2001); *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th  
3 Cir. 1991). For the foregoing reasons, Plaintiff failed to meet its burden in proving that Mayor  
4 Mendiola and Ogo’s conduct exceeded the scope of their employment. Consequently, the  
5 Court declines Plaintiff’s request to review the then-Attorney General’s certification. *See*  
6 *Pellitier v. Federal Home Loan Bank*, 968 F.2d 865, 874 (9th Cir. 1992).

7 **B. PLAINTIFF FAILED TO INVOKE THE EXCEPTION TO CELRTCA’S EXCLUSIVE REMEDY**  
8 **RULE FOR ACTIONS BROUGHT FOR A VIOLATION OF THE CONSTITUTION.**

9 Generally, a plaintiff’s exclusive remedy is against the Commonwealth in an action  
10 arising from the negligent or wrongful act or omission of a Commonwealth employee while  
11 acting within the scope of his office or employment. 7 CMC § 2208(b)(1). However, a  
12 plaintiff may be able to recover against the individual employee tortfeasor for actions “brought  
13 for a violation of the Constitution(s) of the United States or the Commonwealth.” 7 CMC §  
14 2208(b)(2)(A). Here, Plaintiff contends CELRTCA’s exclusive remedy rule does not apply  
15 because “both Counts 4 and 5 arise out of Defendants’ denial of due process and deprivation of  
16 property against Plaintiff.” (Pl.’s Opp’n. at 5.) This argument is moot since Defendants did  
17 not move to substitute the CNMI government with respect to Counts 4 and 5. (Defs.’ Mot. for  
18 Partial Substitution at 1) (“As to Counts 4 and 5, which require actual persons as defendants,  
19 the CNMI Office of the Attorney General will represent Defendants Mendiola and Ogo and  
20 enters its Appearance for them at this time.”).

21 Plaintiff did not bring an action for a violation of the Constitutions of the United States  
22 or Commonwealth with respect to Counts 1,<sup>6</sup> 2, or 3. Furthermore, the Court dismissed

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24 Commonwealth shall be substituted as the party defendant, if the Commonwealth was not  
25 already a defendant in the suit. An order dismissing the employee from the suit shall be  
entered.

26 <sup>6</sup> On November 14, 2012 the Court issued a ruling on Defendants’ motion to dismiss. Therein, the Court “[found]  
27 that the complaint provides *sufficient factual support* to show a violation of Plaintiff’s First Amendment right to  
28 free speech for the sole purpose of denying Defendants qualified immunity.” (Order Granting In Part Def.s’ Mot.  
to Dismiss at 6, n.9) (emphasis added). That ruling denying Defendants qualified immunity for Count I is  
consistent with the Court’s ruling in this order that denies application of the exclusive remedy exception for a  
constitutional cause of action based on CELRTCA. The qualified immunity standard under *Saucier v. Katz*, 533

1 Plaintiff's constitutional claims for a violation of due process as alleged in Counts 4 and 5 of  
2 the original Information because Plaintiff, as an at-will employee, was not entitled to due  
3 process prior to termination. (Order Granting In Part Defendants' Motion to Dismiss at 13-14.)  
4 Plaintiff's exclusive remedy is against the Commonwealth. 7 CMC § 2208(b)(1).

5 **C. PLAINTIFF'S CLAIMS ARE AGAINST COMMONWEALTH EMPLOYEES WHO ARE COVERED**  
6 **BY CELRTCA.**

7 Plaintiff asserts that the "CNMI government is not liable for any claims arising out of  
8 'interference with contract rights.'" (Pl.'s Opp'n. at 6 (emphasis included)) (quoting 7 CMC §  
9 2204(b)). While this is an accurate statement of the law, it is completely irrelevant since  
10 Plaintiff did not assert any claim for "interference with contract rights."

11 Plaintiff claims that "the Court should find that Defendants Melchor and Arvin's  
12 intentional tort is not protected by CELRTCA" because it could lead to the dismissal of the  
13 case. (*Id.*) The fact that the case may end if the CNMI government is substituted as the sole  
14 defendant, due to the Government Liability Act, is not a reason to deny application of  
15 CELRTCA. The Commonwealth Supreme Court analyzed this precise issue and held that "[i]t  
16 is conceivable, but not probable, that a Commonwealth employee could commit an intentional  
17 tort within the scope of his or her employment, receive certification from the Attorney General,  
18 and the injured party would then be barred from recovery under 7 CMC §§ 2210(c) and 2204."  
19 *Kabir*, 2009 MP 19 ¶ 42. The Court went on to say that such a scenario is not an oversight of  
20 the legislature, noting that "7 CMC § 2210(c) makes clear that once certification issues and the  
21 government is substituted, the suit 'shall proceed in the same manner as any other action  
22 against the Commonwealth,' which includes government immunity for intentional torts." *Id.*  
23 Plaintiff fails to prove that CELRTCA should not cover Mayor Mendiola and Ogo.

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26 U.S. 194, 201 (2001) is completely different from CELRTCA's exclusive remedy exception articulated in 7 CMC  
27 section 2208(b)(2)(A). The qualified immunity standard focuses on the *facts* alleged in the complaint; whereas,  
28 CELRTCA focuses on the *causes of action* asserted in the complaint. Furthermore, in determining whether  
government employees are protected by qualified immunity, the court views the facts "[t]aken in the light most  
favorable to the party asserting the injury." *Saucier*, 533 U.S. at 201. However, in the context of CELRTCA,  
there is a presumption of immunity for government employees upon certification by the Attorney General, as in  
this case. *See Coleman*, 91 F.3d 820, 823 (6th Cir. 1996).

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**IV. CONCLUSION**

For the forgoing reasons, Defendants’ motion for partial substitution is hereby **GRANTED.**

**IT IS SO ORDERED** this 29th day of November, 2012.

/s/  
**ROBERT C. NARAJA, Presiding Judge**