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Clerk
District Court

AUG 22 2000

For The Northern Mariana Islands
By ~~_____~~
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

RUDY C. AGUON,)
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Plaintiff)
)
v.)
)
COMMONWEALTH PORTS)
AUTHORITY, *et al.*,)
)
Defendants)
_____)

Civil Action No. 00-0009

ORDER RE:
DEFENDANTS' MOTION
TO DISMISS FOR FAILURE TO
STATE A CLAIM UPON
WHICH RELIEF CAN BE
GRANTED

THIS MATTER¹ came before the court on defendants' motion to
dismiss all three causes of action in plaintiff's first amended complaint. Plaintiff
is represented by attorney, Reynaldo O. Yana; defendants are represented by

_____)
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Decision of this motion was held in abeyance pending settlement
discussions, which have so far proved unfruitful.

1 attorney, Douglas F. Cushnie.

2 THE COURT, having considered the motion, rules as follows:

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4 Defendants have moved to dismiss the first amended complaint for
5 failure to state claims upon which relief can be granted, pursuant to
6 Fed.R.Civ.P. 12(b)(6). A motion to dismiss for failure to state a claim will
7 succeed only if from the complaint it appears beyond doubt that plaintiff can
8 prove no set of facts in support of the claim that would entitle him to relief.
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10 Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999). All allegations of material
11 fact are taken as true and construed in the light most favorable to the non-
12 moving party. Enesco Corp. v. Price/Costco, Inc., 146 F.3d 1083, 1085 (9th
13 Cir. 1998).

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15 Here, defendants initially move to dismiss the first and second causes of
16 action by arguing that the Commonwealth government, its agencies,
17 commissions, boards, and employees acting in their official capacities are not
18 "persons" within the meaning of 42 U.S.C. § 1983.
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22 The court agrees, as it has stated before:

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24 It is settled law that the Commonwealth of the Northern Mariana
25 Islands ("CNMI"), its governmental entities, and officials sued in
26 their official capacities are not "persons" within the meaning of §
1983 and cannot be held liable under the statute. See Ngiraingas v.

1 Sanchez, 495 U.S. 182, 191-192 (1990); DeNieva v. Reyes, 966 F.2d
2 480, 483 (9th Cir. 1992); Magana v. CNMI, 107 F.3d 1436, 1447
3 (9th Cir. 1997).²

4 If defendant Commonwealth Ports Authority ("CPA") is deemed an
5 "arm of the state" it, too, will be immune from suit brought under 42 U.S.C. §
6 1983. That is, if its identity is more akin to a government agency than to a
7 genuinely autonomous agency, the first amended complaint must be dismissed
8 as per the authorities cited above.
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10 This court has had previous occasion to consider the possible immunity
11 from suit of a government agency and its employees acting in their official
12 capacity. In Oden v. Northern Mariana College ("NMC"), et al., Civil Action
13 No. 98-0020 (Oct. 29, 1999), the court conducted the following analysis:
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15 The parties are in agreement that, if Northern Marianas College is
16 deemed an "arm of the state," all § 1983 claims against the
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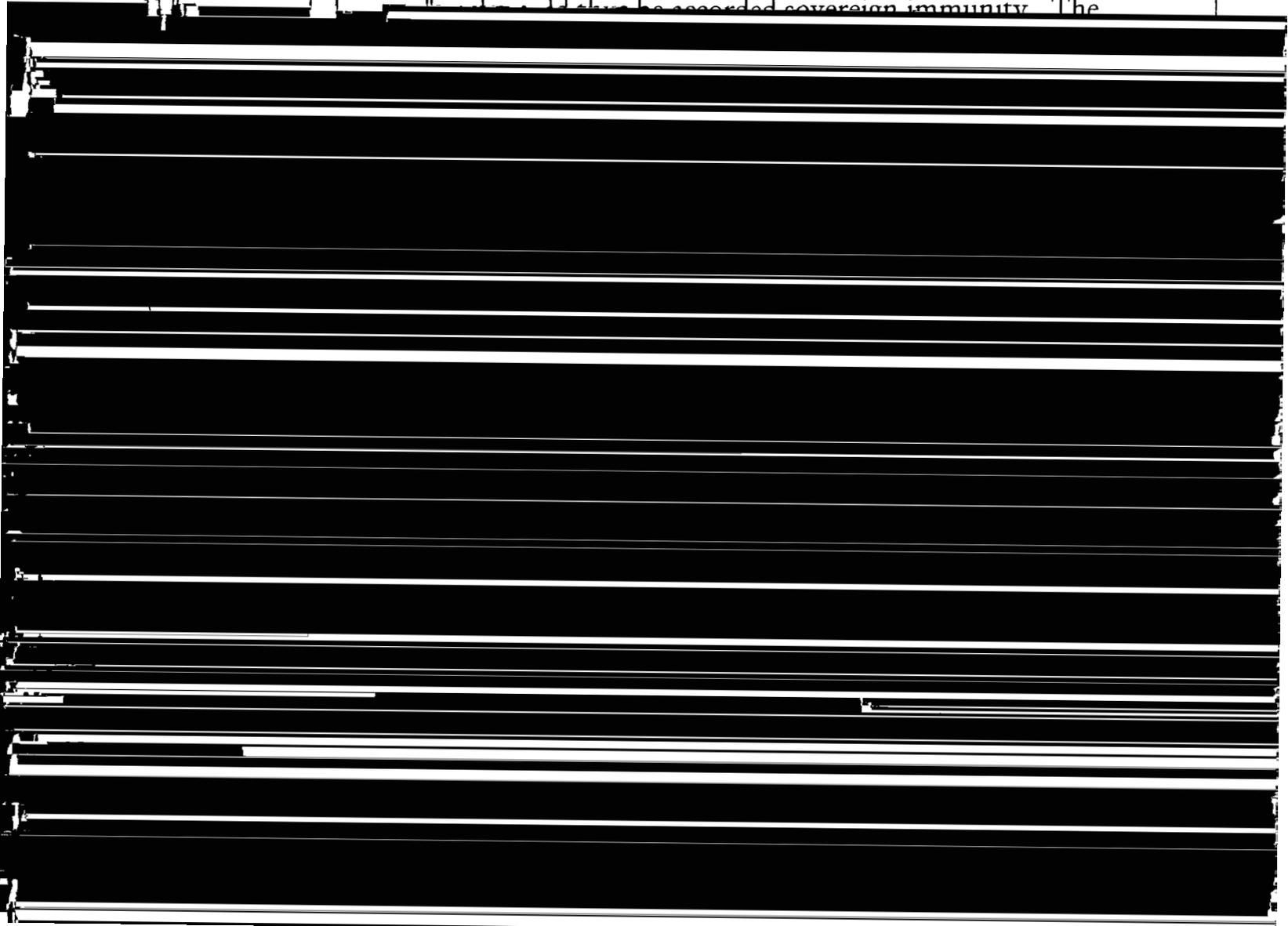
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20 There is an exception for injunctive relief, which is not relevant in this
21 matter. See Guam Soc. of Obstetricians & Gynecologists v. Ada, 962 F.2d
22 1366, 1371 (9th Cir.), cert. denied, 506 U.S. 1011 (1992) (An official of a state or
23 territory, when sued for prospective injunctive relief in his or her official
24 capacity, is considered a "person" for § 1983 purposes); see also Doe v.
25 Lawrence Livermore Nat'l Lab., (9th Cir. Dec. 15, 1997) (holding that state
26 official is "person" within the meaning of § 1983 in suit seeking prospective
 injunctive relief). This is because "official-capacity actions for prospective relief
 are not treated as actions against the State." Kentucky v. Graham, 473 U.S.
 159, 167 n.14 (1985).

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individual defendants in their official capacities must be dismissed, as per Magana v. CNMI, 107 F.3d 1436, 1443 (9th Cir. 1997) and earlier cases. As defendants note, this defect cannot be cured by amendment and, accordingly, any claim for relief alleged on this ground must be dismissed with prejudice.

However, plaintiff claims NMC is autonomous from the Commonwealth government and that neither it nor its employees acting in their official capacities are entitled to any form of sovereign immunity. Because the record before the court has not yet been fully developed, the court declines to issue a final ruling on this aspect of government defendants' motion at this time. However, from the materials currently on file and available to the court, it appears that Northern Marianas College is indeed an "arm of the government" and thus should be accorded sovereign immunity. The



1 the Commonwealth...to their fullest potential.” 2 N.Mar.I. Code § 2111. The
2 Authority is “in the Commonwealth government” and is described as “a public
3 corporation” whose functions “are governmental and public and who may sue
4 and be sued in its own name.” 2 N.Mar.I. Code § 2121. The Authority has a
5 board of directors appointed by the Governor with the advice and consent of
6 the Senate. 2 N.Mar.I. Code § 2123. The Board members are not subject to the
7 appointment procedures generally applicable to other Commonwealth
8 appointees. *Id.*, see also 1 N.Mar.I. Code § 2901. Board members may be
9 removed by the Governor only for cause. *Id.* “All powers vested in the
10 authority shall be exercised by the board of directors[.]” *Id.* The Board’s
11 powers and duties are comprehensive, and they allow the Authority, through
12 the Board to, *inter alia*, “carry on the business of acquiring, establishing,
13 developing, extending, maintaining, operating, and managing ports, with all
14 powers incident thereto,” to “have exclusive jurisdiction” to operate all phases
15 of the ports, including building codes and regulations, to “purchase, lease, and
16 sell real or personal property, supplies, goods, materials and commodities”
17 incident to the operation of port properties, to “procure insurance against
18 liability,” to “enter into contracts, leases, and other arrangements” of up to forty
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years' duration, to sue and be sued in its own name, to determine charges and rentals for use of all property under its control, to determine the terms and conditions for the use of all property under its control, to retain and use for its own purposes all revenues received, to enter into contracts with the "government, its departments and agencies" for services such as police and fire protection and maintenance, planning, and purchasing services, to adopt and enforce rules and regulations for operation of the ports, to "have the free use of government pouch mails and other government communication facilities," to "apply for, accept, expend, and repay the United States or the Commonwealth for all monies made available by grant, loan, or both," to request assistance from departments of the Commonwealth government in carrying out its activities and to reimburse those departments for such assistance, to "employ agents, employees, or contract for the services of a qualified executive director, specialists or experts...to advise and assist the authority and its employees" (and such hirees are exempt from the Commonwealth Civil Service Act), to "set its own compensation, wage and salary scales" so long as they are "commensurate with those paid by the Commonwealth" for "comparable education, training, or experience," to issue general or special revenue bonds, to "apply for and

1 accept” in its own name “any lands now controlled by the United States,” and
2 to prepare its own budget, which the Board must adopt. 2 N.Mar.I. Code §
3 2122(a)-(s).
4

5 Further, the Board appoints the Executive Director, who serves at the
6 Board’s pleasure and whose compensation is determined by the Board. 2
7 N.Mar.I. Code § 2126. The Executive Director “selects and appoints”
8 employees. 2 N.Mar.I. Code § 2127(g).
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11 The Board of Directors establishes the Authority’s “rules and regulations
12 governing the selection, promotion, performance evaluation, demotion,
13 suspension, dismissal, and other disciplinary rules” for CPA employees. 2
14 N.Mar.I. Code § 2130.
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16 Also, “[t]o the extent that any liability of the Commonwealth or of the
17 authority is covered by any policy of insurance, the government waives its
18 limitation of liability” and “[e]ach policy of insurance written covering the
19 authority or its interest shall contain a clause waiving any defense of sovereign
20 immunity...up to the limits of the policy.” 2 N.Mar.I. Code § 2133.
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23 The CPA may also acquire property by eminent domain, 2 N.Mar.I.
24 Code § 2151, it is exempt from taxation and licensing, § 2161, from execution
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1 of judgments against it except as the Board provides, § 2162, from bond and
2 security requirements in any suit or action brought by or against it, § 2163, and
3 no lien may be filed against any CPA property, *id.*
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5 Finally, when the CPA was reorganized, it was given the responsibility
6 to “assume all rights, obligations, and duties of the government...under any
7 agreements that the government...may have with any department or agency of
8 the United States in connection with the operation of any ports in the
9 Commonwealth and shall be eligible to act for the Commonwealth and to do
10 anything necessary to establish eligibility for...federal funding. 2 N.Mar.I.
11 Code § 2185. Employees of CPA are not employees of the Commonwealth
12 and the Commonwealth Civil Service Act does not apply to them. 2 N.Mar.I.
13 Code § 2186.
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18 On balance, the court finds that defendant Commonwealth Ports
19 Authority has sufficient autonomy from the central Commonwealth
20 government that it should not be deemed an “arm of the state.” Accordingly,
21 defendant CPA is not immune from 42 U.S.C. § 1983 liability using the “arm
22 of the state” analysis set out above.
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25 For the same reason, defendant Cabrera, sued “individually and as Port
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1 Manager of CPA,” First Amended Complaint, *passim* (May 16, 2000), is not
2 immune from suit under 42 U.S.C. § 1983.
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4 However, even though the Port has been found by the court to be
5 sufficiently autonomous so as not to share the Commonwealth government’s
6 immunity from § 1983 suit, the question remains whether both the Port and
7 Cabrera may still be susceptible to suit under § 1983 as “state actors” who acted
8 under “color of state law.” That is, does defendant CPA’s “autonomy” render
9 both CPA and Cabrera completely distinct from the Commonwealth
10 government and, thus, free from even the possibility of § 1983 liability? The
11 court answers in the negative.
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15 Courts generally will find “state action” sufficient to support a 42 U.S.C.
16 § 1983 lawsuit: (1) where there is an interdependent or symbiotic relationship
17 between the state and the entity being sued, (2) where the state requires,
18 encourages, or is otherwise significantly involved in nominally private conduct,
19 and (3) where the entity exercises a traditional state function. See Sheldon H.
20 Nahmod Civil Rights and Civil Liberties Litigation: The Law of Section 1983
21 (4th ed.) § 2.4 (1997) and cases cited therein.
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25 The court finds that there remains a sufficiently close nexus between the
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1 Commonwealth government and defendant CPA to warrant a finding that,
2 although CPA is not an “arm of the state,” it is a “state actor” acting under
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4 “color of state law” for purposes of 42 U.S.C. § 1983.

5 As noted above, CPA is “in the Commonwealth government,” and is a “a
6 public corporation” whose functions “are governmental and public[.]” 2
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8 N.Mar.I. Code § 2121. The CPA may acquire property by eminent domain, §
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10 2151, a power traditionally held by sovereigns. The Authority’s board of
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12 directors is appointed by the Governor with the advice and consent of the
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14 Senate, § 2123. The authority can use Commonwealth resources and
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16 employees as needed, § 2122. Employees of CPA are not employees of the
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18 Commonwealth and the Commonwealth Civil Service Act does not apply to
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20 them, § 2186. However, CPA’s employees may participate in the
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22 Commonwealth government’s retirement and health and life insurance
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24 programs, § 2130. The relationship between the Commonwealth government
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26 and CPA is symbiotic, CPA exercises a traditional state function when it
controls the ports of entry, and the Commonwealth still plays a significant role
in CPA’s activities.

Because the court has found that defendant CPA is a state actor,

1 defendant Cabrera acting in his official capacity is also a “state actor” acting
2 under “color of law” and is susceptible to suit under 42 U.S.C. § 1983.
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4 However, because plaintiff’s first amended complaint makes no
5 allegations against defendant Cabrera in his individual capacity, any claims
6 purportedly predicated upon personal liability are dismissed, without prejudice.
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8 Thus, accepting as true the material allegations of plaintiff’s complaint,
9 and construing them in the light most favorable to plaintiff, Enesco Corp., 146
10 F.3d at 1085 (9th Cir. 1998), the court cannot at this juncture say that plaintiff
11 can prove no set of facts in support of the first two claims that would entitle
12 him to relief (with the exception of the claims purportedly against defendant
13 Cabrera in his individual capacity). Morley v. Walker, 175 F.3d at 759 (9th Cir.
14 1999). Accordingly, defendants’ motion to dismiss the first and second causes
15 of action of plaintiff’s first amended complaint is denied, except as to allegations
16 against defendant Cabrera in his individual capacity.
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21 Defendants also argue that plaintiff’s third cause of action---which alleges
22 harassment and retaliation for filing a complaint with the Equal Employment
23 Opportunity Commission (“EEOC”) and is brought pursuant to 42 U.S.C. §
24 2000e-2 (“Title VII”)---must fail because it was not timely filed and because it
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does not allege breach of a constitutionally protected right, i.e. it does not allege discrimination based upon race, color, religion, sex, or national original.

Plaintiff's third cause of action is dismissed, without prejudice. Liability predicated on 42 U.S.C. § 2000e *et seq.* must be based on allegations of discrimination based on race, color, religion, sex, or national original. Plaintiff's complaint makes no such allegations.

Accordingly, defendants' motion to dismiss plaintiff's first and second causes of action is denied, except insofar as the motion was directed against claims against defendant Cabrera in his individual capacity, in which case it is granted. Defendants' motion to dismiss plaintiff's third cause of action is granted, without prejudice.

IT IS SO ORDERED.

DATED this 22nd day of August, 2000.



ALEX R. MUNSON
Judge