Taro v. ROP, 12 ROP 175 (Tr. Div. 2004)
GERMANCE TARO,
Plaintiff,

v.

REPUBLIC OF PALAU, represented by its President, and JIMMY WONG,
Defendants.

CIVIL ACTION NO. 04-070

Supreme Court, Trial Division
Republic of Palau

Decided: November 11, 2004

LARRY W. MILLER, Associate Justice:

This matter is before the Court on the Republic of Palau's motion for judgment on the pleadings. For the reasons stated herein, the motion will be denied.

According to his complaint, Plaintiff is the father of Greg (Poda) Germance who, while an inmate at Koror Jail, was murdered by another inmate, defendant Jimmy Wong. The complaint alleges that the Republic had a duty to protect Germance from harm, that that duty was heightened by the fact that Germance was an informant working for the Republic, and that negligence on the part of the Republic was the proximate cause of Germance's death, specifically that it failed to ensure that contraband -- the murder weapon -- did not fall into the hands of other inmates. In now moving to dismiss the complaint, the Republic argues that it falls outside the types of claims for which it has waived sovereign immunity.

The Republic's waiver of its sovereign immunity from suit is set forth in 14 PNC § 501(a)(3), which allows

> civil actions against the government of the . . . Republic on claims for money ⊥176 damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the government of the . . . Republic, if a private person, would be liable to the claimant . . .

That waiver is limited, however, by 14 PNC § 502(b), which excludes

> any claim based on an act or omission of an employee of the government ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any agency or employee of the

> government, whether or not the discretion involved be abused.[1]

It is the Republic's contention that the "discretionary function" exception contained in § 502 bars this action.

The parties are in agreement that both the waiver of sovereign immunity and the "discretionary function" exception to that waiver contained in §§ 501 and 502 are derived from the U.S. Federal Tort Claims Act (FTCA) and that U.S. cases interpreting the FTCA are therefore useful in interpreting these provisions. *Cf. Becheserrak v. Republic of Palau*, 7 ROP Intrm. 111, 115 (1998) (noting that 14 PNC § 503 was also taken from the FTCA). The most recent U.S. Supreme Court case interpreting the "discretionary function" exception is *United States v. Gaubert*, 111 S. Ct. 1267 (1991). There, the Court "formulated a two-part test to determine whether a governmental act falls within the exception":

> First, a court must ask whether the act involves "an element of judgment or choice." . . . If the answer to that question is "yes" then the court must ask "whether that judgment is of the kind that the discretionary function exception was designed to shield."

Montez v. United States, 359 F.2d 392, 395 (6th Cir. 2004) (quoting *Gaubert*, 111 S. Ct. at 1273). The Court explained further that "[b]ecause the purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort, . . . when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 111 S. Ct. at 1273-74 (internal quotations omitted).

The first part of the test is easily met here: the running of a prison, both in terms of overall policy-setting and day-to-day ⊥177 operations, involves a great deal of "judgment or choice." Although plaintiff points to regulations requiring "respect and protection of individual rights" and directing that "[h]umanitarian concerns will not be neglected", these directives obviously leave wide open the manner in which prison officials should accomplish those goals. Even more specific regulations, for example, directing that "systematic, unscheduled shake downs should take place," leave room for discretion in determining when or how often they should occur.[2]

The more difficult question is the second one -- "whether the judgment is of the kind that the discretionary function exception was designed to shield." Plaintiff relies on a much older

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[1]Section 502 says that the the Court "shall not have jurisdiction" over such claims. Although the Appellate Division observed that the "use of jurisdictional language . . . was perhaps misadvised" given the broad jurisdictional grant of Article X, Section 5 of the Constitution, it nevertheless concluded that Section 502 "does not purport to limit the court's jurisdiction as conferred by the Constitution" and that its "clear effect . . . is to preserve the Republic's sovereign immunity in certain cases." *Tell v. Rengiil*, 4 ROP Intrm. 224, 228 (1994).

[2]The most specific regulation pointed to by plaintiff requires officers "to inspect all items given to prisoners by anyone." But, as the Republic responds, plaintiff's complaint fails to allege what the murder weapon was, much less that it was provided to Wong by a visitor.

case, which held that the exception "is properly limited to the planning level and not to the operational level." *Cohen v. United States*, 252 F. Supp. 679, 687 (N.D. Ga. 1966). *Gaubert* squarely rejected this distinction, holding that "[d]iscretionary conduct is not confined to the policy or planning level," 111 S. Ct. at 1275. Rather, "[t]he focus of the inquiry is . . . on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* Thus, the question is not whether it was the Minister of Justice or a prison guard who took some action (or failed to act), but whether the choice made in performing that action could be said to involve policy considerations.

The problem with applying this standard at this stage of the proceedings is that there is no record to which to apply it. The Republic argues, with support, that the absence of factual allegations which would negate the applicability of the discretionary function exception is fatal to plaintiff's complaint. Several cases cited by the Republic rely on *Gaubert* to hold essentially that governmental actions will be presumed to fall within the exception unless a plaintiff pleads specific facts negating its applicability. Most notable among these cases is *Calderon v. United States*, 123 F.2d 947 (7th Cir. 1997) which, like the present case, involve a prisoner-on-prisoner assault where it was alleged that the victim was an informant whom the prison authorities failed to adequately protect. The case was dismissed by the trial court, and the court of appeals affirmed, finding it "clear that balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy." 123 F.2d at 951.

The Court is frankly troubled by these cases, because they seem to ignore the general rule that "a complaint should not be dismissed 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." *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957).[3] In line with this rule, the Supreme Court has rejected a heightened pleading standard for civil rights cases, finding such a standard "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 113 S. Ct. 1160, 1163 (1993). *Leatherman*, which was decided two years ⊥178 after *Gaubert*, reiterated that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Id.* (quoting *Conley*, 78 S. Ct. at 103).

Consistent with this understanding -- which applies equally to the Palau Rules of Civil Procedure -- and in contrast to the cases relied upon by the Republic, there are others that deny the dismissal of complaints so long as they can be read to allege "negligence unrelated to any plausible policy objectives." *Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000). Most notable among these is *Palay v. United States*, 349 F.3d 418 (7th Cir. 2003), which was decided by the same court that decided *Calderon* (albeit by a different panel of judges) and which involved injuries suffered by an inmate during a fight among rival gangs. In reversing the trial court's dismissal of the complaint, the *Palay* Court observed:

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[3]As plaintiff correctly points out, the same standard is applicable to motions for judgment on the pleadings pursuant to Rule 12(c). 2 *Moore's Federal Practice* (3d ed. 1995), ¶12.38 at p.12-100 n.6 (citing cases).

> [I]t is easy to imagine a scenario in which [prison] officials behaved in a negligent fashion, but without making the types of discretionary judgments that the statutory exception was intended to exempt from liability. Perhaps the corrections officer monitoring the holdover unit at the time the gang altercation broke out was simply asleep, for example. Or perhaps he left the unit unattended in order to enjoy a cigarette or a snack. That type of carelessness would not be covered by the discretionary function exception, as it involves no element of choice or judgment grounded in public policy considerations.

349 F.3d at 432.[4] And, rather than requiring that the plaintiff plead his case with exactitude, it emphasized that the possibility that plaintiff could adduce facts that would entitle him to relief was enough to forestall dismissal:

> [B]eing at the pleading stage of the case, there is much we do not know about the circumstances that led to Palay's injury. But we cannot say that *no* set of facts consistent with Palay's complaint would entitle him to relief, and we must be able to say that before dismissing Palay's claims.

Id. (emphasis in original).[5]

⊥179

The Court is inclined to take the same approach here. Plaintiff's allegation that the Republic "did not take reasonable precautions to ensure that . . . inmates . . . were prevented from acquiring, possessing, making, or using deadly weapons" could conceivably be read to attack jail procedures that, effective or not, were the result of policy judgments about the best way to secure the jail; but it could also be read to say simply that, for whatever reasons, the guards at the jail didn't do their job. As long as the latter reading is plausible, the Court believes that dismissal on the pleadings is inappropriate.

"This does not necessarily mean that plaintiff is entitled to trial on the basis of an ambiguous complaint." *Coulthurst*, 214 F.3d at 111. The Republic may seek to re-open discovery and/or may recast its motion as a motion for summary judgment and thereby require plaintiff "to declare what is the negligent conduct he alleges occurred and to reveal whatever evidence he relies on to show such negligence. If the plaintiff is unable to offer sufficient

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[4]The Court distinguished *Calderon*: "Unstated but implicit in *Calderon* is the assumption that prison officials in that case had taken note of threats against the plaintiff in that case and weighed the relevant considerations in deciding how best to act (or not) in response to those threats. . . . Here, we lack a developed record that would permit us to decide as a matter of law whether the actions that allegedly resulted in Palay's injuries reflected the exercise of discretionary policy judgments." *Palay*, 349 F.3d at 432.

[5]"We have only Palay's complaint before us, and we can sustain the dismissal of that complaint only if under no set of facts consistent with that complaint could he circumvent the discretionary function exception. . . . Because it is possible to imagine facts showing that Palay's injuries were not the result of permissible discretionary judgments, he is entitled to proceed on his complaint. It remains for his claims to be fleshed out with evidence before the court can say whether the discretionary function exception applies." *Palay*, 349 F.3d at 432.

evidence to establish a triable issue of fact on any theory of negligence outside the scope of the [discretionary function exception], then the [Republic] will be entitled to judgment." *Id.*; *cf. Leatherman*, 113 S. Ct. at 1163 ("courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1598 (1998) ("summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial").

For all of these reasons, the Republic's motion is denied. A status conference to schedule further proceedings is set for November 22, 2004, at 1:15 p.m.