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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL CLARK; et al.,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 07-16554

D.C. No. CV-07-00805-HRL

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Howard R. Lloyd, Magistrate Judge, Presiding**

Submitted March 18, 2009***

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The parties consented to the jurisdiction of the magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Daniel and Yupapan Clark appeal pro se from the district court's order dismissing their Federal Tort Claims Act ("FTCA") action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for lack of subject matter jurisdiction, *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 649 (9th Cir. 1992), and we affirm.

The district court properly dismissed the Clarks' FTCA action for lack of subject matter jurisdiction because the Clarks showed no "persuasive analogy" under which a private person would be liable in tort under like circumstances. *Westbay Steel*, 970 F.2d at 650 (citation omitted); *see also* 28 U.S.C. §§ 1346(b)(1), 2674. Further, to the extent the Clarks identified a cognizable tort under applicable local law, it would be preempted by the Employee Retirement and Income Security Act ("ERISA") against a private employer. *See Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 488 (9th Cir. 1983) (state law claims alleging improper processing of disability benefits claim preempted by ERISA), *rev'd on other grounds*, 473 U.S. 134, 138 n.4, 148 (1985) ("[T]he relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that . . . Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims.").

The Clarks' contentions regarding the district court's denial of their summary judgment motion are moot.

AFFIRMED.